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CORRELATIVE RIGHTS IN OIL AND GAS[†]

Eugene Kuntz[*]

There have been innumerable judicial references to the "correlative rights" of owners of mineral rights in a common source of supply of oil or gas. The references have been particularly frequent in those cases which involve the validity and application of conservation regulations. Although the references have been frequent, the limits of the concept and the component rights included within the general reference still defy definitive and comprehensive description. It is possible, however, from an examination of cases involving rights of owners of mineral interests inter se, to derive a general concept and to identify certain rights which have been recognized.

Owners of land overlying a common source of supply stand in a peculiar relationship to one another in the sense that any extractive operation by one will have an apparent and inevitable effect upon the economic welfare of the others. Under the law of capture, each has the right to extract oil and gas from the common source of supply without accounting to the others for a share of production,[1] but such right must be exercised with due regard for other owners who likewise have rights to extract oil and gas from the same source of supply. The term "correlative rights" is a term used to refer to all of the rights and duties that exist between such owners with regard to operations in a common source of supply. Although the elements which are included within the collective term have not been judicially classified or analyzed, a simple classification of rights now recognized suggests itself from the cases. Recognizing that such rights may overlap in any given case, the correlative rights of owners in a common source of supply include: (1) the right against waste of extracted substances, (2) the right against spoilage of the common source of supply, (3) the right against malicious depletion of the common source of supply, (4) the right to a fair opportunity to extract oil or gas. The owners may enter into agreements with each other regarding their correlative rights, and such agreements will be enforced if conservation is not involved.[2]

[†] Copyright, 1958, by Eugene Kuntz.

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[1] Alphonzo E. Bell Corp. v. Bell View Oil Synd., 24 Cal. App. 2d 587, 746, 76 P.2d 166, 167 (1938); Triger v. Carter Oil Co., 372 Ill. 182, 23 N.E. 2d 55 (1939); Carlock v. Krug, 151 Kan. 407, 99 P.2d 858 (1940); Hammonds v. Central Ky. Nat. Gas Co., 255 Ky. 685, 75 S.W.2d 204 (1934); McCoy v. Arkansas Nat. Gas Co., 175 La. 487, 143 So. 383, 85 A.L.R. 1147, *cert. denied* 287 U.S. 661 (1932); Toomey v. State Board of Land Com'rs, 106 Mont. 546, 81 P.2d 407 (1938); Application of Repub. Light, Heat & Power Co., 265 App. Div. 74, 38 N.Y.S. 2d 302 (1942); Kelly v. Ohio Oil Co., 57 Ohio St. 319, 49 N.E. 399, 39 A.L.R. 765 (1897); Gruger v. Phillips Pet. Co., 192 Okl. 259, 135 P.2d 485 (1943); Jones v. Forest Oil Co., 194 Pa. 379, 44 Atl. 1074, 48 A.L.R. 748 (1900); Eliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558, 4 A.L.R. 2d 191 (1948); Musgrave v. Musgrave, 86 W. Va. 119, 103 S.E. 302, 16 A.L.R. 564 (1920). See Hassie Hunt Trust Co. v. Proctor, 215 Miss. 84, 60 So.2d 551, 1 O&GR 1644 (1952).

WASTE OF EXTRACTED SUBSTANCES

In an early case, it was held that the owner of a gas well is privileged to waste the gas by permitting it to escape into the air and an owner in the common source of supply may not prevent such conduct.[3] This case represents the high water mark of the law of capture in the recognition that an owner may use or abuse his right to extract substances from land without regard to the interests of owners in the common source of supply. At present, the judicial attitude is radically different.

The various oil and gas producing states have statutory provisions designed to prevent waste of natural resources and to protect correlative rights of owners in a common source of supply. Whether or not such statutes and regulations pursuant thereto governing operations may form the basis of relief between private parties must be determined in the light of the specific legislation and the law of such states. Independent of statute, however, some limitation upon the rights under the law of capture are recognized at common law. The owner may extract gas for "legitimate" purposes, but another owner of land over the common source of supply may enjoin him from wasting the gas deliberately.[4] Damages may also be recovered for wanton or intentional wasting of gas.[5] Where, however, gas serves the purpose of lifting oil, the owner of the oil rights may permit the gas to escape although another person owns the gas rights in the same tract.[6]

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[2] Railroad Comm. v. Humble Oil & Ref. Co., 193 S.W.2d 824 (Tex. Civ. App. 1946).

[3] Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714, 22 L.R.A. 141, 37 Am.St.Rep. 736 (1893).

[4] Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S.W. 368, 70 L.R.A. 768 (1908). See Calor Oil & Gas Co. v. Franzell, 128 Ky. 715, 109 S.W. 328, 36 L.R.A. (N.S.) 456 (1908). But see Sneed v. Phillips Pet. Co., 76 F.2d 785 (5th Cir. 1935); Corzelius v. Harrel, 179 S.W.2d 49 (Tex. Civ. App. 1944), *rev'd on other grounds,* 143 Tex. 509, 186 S.W.2d 961 (1945).

[5] Louisville Gas Co. v. Kentucky Heating Co., 132 Ky. 435, 111 S.W. 374 (1908). See Calor Oil & Gas Co. v. Franzell, 128 Ky. 715, 109 S.W. 328, 36 L.R.A. (N.S.) 456 (1908).

[6] Arnold v. Garnett Light & Fuel Co., 103 Kan. 166, 174 P. 1027 (1918).

As to negligent operations which result in waste, the problem is slightly different. If the negligent operation results in a blowout or other single event with resultant waste of gas or other substances, there is no occasion to consider the possibility of an injunction. Where, however, negligent operations are conducted which result in a continuous loss of gas or which threaten to produce a catastrophe, the situation should be treated as a willful or wanton waste of gas, and an injunction should issue.

Where damages are sought for negligent waste of gas, it may make a difference whether the negligence consisted of a single dereliction or was continuing in nature. If negligent operations are conducted which result in continuing loss of gas, damages should be recoverable on the basis of willful or wanton waste of gas if the operations are conducted after the operator is aware of the loss produced. Where the loss results from a single event produced by negligence, such as a blowout, or the negligent failure to bring the well under control after an accident, the result may differ, depending upon the jurisdiction. In Louisiana, recovery was denied where the only damage produced was the exhaustion of gas.[7] The result was predicated upon the impossibility of showing what proportion of the gas wasted came from beneath plaintiff's land and upon the proposition that under Louisiana law the gas was not subject to absolute ownership until reduced to possession. If the plaintiff is able to show that the market value of his mineral rights has been impaired, however, there is reason to believe that recovery would be allowed.[8] In Texas, a different result was reached, based upon the theory of ownership in place and a greater confidence in the possibility of determining the amount of oil and gas recoverable by the various owners in a common source of supply in the light of advances in science. It was held that recovery might be had for damages flowing from negligent operations which result in waste and dissipation of substances from the common source of supply.[9]

As to the measure of damages for waste of extracted substances, there is a division of authority. In Texas, where ownership in place is recognized, it has been strongly suggested that the owner whose land is improperly drained does not lose title to the drained substances and can recover their value.[10] In Kentucky, however, the measure of damages for a malicious waste of gas is not the value of the gas drained or wasted, but is the diminution in value of the natural flow of gas from the plaintiff's land which resulted from the wrong.[11] In Louisiana, any recovery would possibly be measured by the impairment of value of the mineral rights.[12]

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[7] Louisiana Gas & Fuel Co. v. White Bros., 157 La. 728, 103 So. 23 (1925). See McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383, 85 A.L.R. 1147 (1942), *cert. denied* 287 U.S. 661 (1932).

[8] McCoy v .Arkansas Natural Gas Co., 184 La. 101, 165 So. 632 (1936). But see McCoy v. Arkansas Natural Gas Co., 191 La. 332, 185 So. 274 (1938).

[9] Eliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558, 4 A.L.R. 2d 191 (1948).

[10] Ibid.

SPOILAGE OF COMMON SOURCE OF SUPPLY

Closely related to the correlative right against waste of extracted substances is the correlative right against spoilage of the common source of supply. Although they are closely related in that waste of substances may involve a damage to the land structures and oil sands, there is a distinction. In one instance, recovery is sought for the value of substances extracted but wasted, whereas in the other instance recovery is sought for underground waste and the reduction of ultimate recovery. As in the instance of waste of extracted substances, the oil and gas producing states have conservation statutes and regulations designed to prevent spoilage of the oil and gas sands and to secure the maximum ultimate recovery of valuable substances. Independent of such statutes, however, each owner extracting oil and gas must do so with due regard for the interests of others having a common right to produce from the same source of supply. He may be enjoined from conducting operations which threaten to spoil the common source of supply, such as pumping out gas in such quantities that back pressure is reduced and intrusion of water into gas bearing sands is accelerated.[13] He may not leave unplugged an abandoned well which permits the intrusion of air and interferes with pumping operations of an adjoining landowner.[14] Damages may be recovered if injury is produced by improper operations. For example, damages may be recovered for damage to the structure of the land because of loss of gas caused by deliberate use of inferior casing or the employment of incompetent and inexperienced drillers who engage in drunkenness on the premises.[15] Recovery may be had for damages arising from the use of a vacuum pump to extract oil contrary to regulations and accepted practices when production from adjoining land is reduced, even after the use of the pump is discontinued.[16] Damages may be recovered for a negligent failure to plug an abandoned well which permits water to enter gas bearing sands and to impede the flow of another's well and to render it worthless.[17] The negligent shooting of a well may form the basis of an action for damages.[18] While each operator owes a duty to use care in operations to protect the common source of supply from spoilage,[19] there is no liability for harm caused unintentionally in the absence of negligence, and the doctrine of res ipsa loquitur does not apply.[20] Thus, if an operator discovers that his casing has collapsed and is permitting water to enter the productive sands, he is required to use due care to remedy the situation. If due care is used, no liability is imposed although injury to another's well does result.[21]

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[11] Louisville Gas Co. v. Kentucky Heating Co., 132 Ky. 435, 111 S.W. 374 (1908).

[12] See McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383, 85 A.L.R. 1147 (1932), *cert. denied* 287 U.S. 661 (1932); McCoy v. Arkansas Natural Gas Co., 184 La. 101, 165 So. 632 (1936).

[13] Mfgrs. Gas & Oil Co. v. Indiana Nat. Gas & Oil Co., 155 Ind. 461, 57 N.E. 912, 50 L.R.A. 768 (1900).

[14] Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206, 5 A.L.R. 411 (1919).

[15] McCoy v. Arkansas Natural Gas Co., 184 La. 101, 165 So. 632 (1936).

[16] Peterson v. Grayce Oil Co., 37 S.W.2d 367 (Tex. Civ. App. 1931), *aff'd* Grayce Oil Co. v. Peterson, 128 Tex. 550, 98 S.W.2d 781 (1936).

MALICIOUS DEPLETION OF COMMON SOURCE OF SUPPLY

In areas of law not involving oil and gas specifically, there has been considerable learned inquiry into the question of whether or not conduct which is otherwise lawful may become unlawful because of the motive of the actor.[22] There are several oil and gas cases which deal with the significance of motive in the exercise of rights under the law of capture. In most instances, however, the cases are not incisive, and the matter of motive is blended with other factors. Also, in most cases, the matter of motive appears by way of dictum. Extracts from two opinions fairly state the divergence of opinion.

> "The question is not as to the motive — fraud or malice — which may have induced the oil company to drill the wells sought to be enjoined. The only question of practical importance is, had the oil company the legal right to drill the wells? When a person has the legal right to do a certain act, the motive with which it is done is immaterial. The right to acquire, enjoy, and own property carries with it the right to use it as the owner pleases, so long as such use does not interfere with the legal rights of others."[23]

Although this statement begs the question, it obviously describes an extremely individualistic attitude toward freedom in the exercise of "rights." To be contrasted is the statement from another case.

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[17] Atkinson v. Virginia Oil & Gas Co., 72 W. Va. 707, 79 S.E. 647, 48 L.R.A. (N.S.) 167 (1913).

[18] Comanche Duke Oil Co. v. Texas Pacific Coal & Oil Co., 198 S.W. 554, (Tex. Comm. 1927).

[19] See Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558, 4 A.L.R. 2d 191 (1948).

[20] Larkins-Warr Trust Co. v. Watchorn, 198 Okl. 12, 174 P.2d 589 (1946).

[21] Ibid.

[22] Prossar, Torts 5 § (2nd ed. 1955); Ames, How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor, 18 Harv. L. Rev. 411 (1905); Duport, Disinterested Malevolence as an Actionable Wrong, 22 Fordham L. Rev. 185 (1953); Eliot, Malice in Tort, 4 St. Louis L. Rev. 50 (1919); Henderson, Malicious Motive as a Ground of Action, 13 Jurid. Rev. 453 (1901); Lawrence, Motive as an Element in Tort, 12 Maine L. Rev. 47 (1919); Lewis, Should the Motive of the Defendant Affect the Question of his Liability, 5 Colum. L. Rev. 107 (1905).

[23] Kelly v. Ohio Oil Co., 57 Ohio St. 319, 321, 49 N.E. 399, 401, 39 L.R.A. 765, 767 (1897).

> "Upon another trial appellee should be permitted to show, if it can, that appellants or any of them willfully, wantonly, or designedly wasted the gas for the purpose of injuring appellee in its business; in other words, that they acted in bad faith. On the other hand, appellants should be permitted to show, if they can, that they acted in good faith in operating the lampblack factory."[24]

An analysis of the cases reveals that there is a prevalent, though ill defined, notion that motive is a significant factor in determining the limitation that correlative rights place upon the law of capture. The rare case is the one in which motive is described as being immaterial.[25] The cases are also rare in which the possibility of a finding of the presence of malice or bad faith had an influence on the result of the case.[26] In other instances, the cases involve a finding of no liability, but the court in each case felt compelled to observe that malice or a sinister purpose was not present.[27]

As is true in most competitive economic endeavors, the activities of a successful competitive oil or gas operator have an inevitable impact upon the economic welfare of others producing competitively from the same source of supply. Under the law of capture, each is privileged to inflict loss upon the other in the process of seeking an economic advantage, and any loss is damnum absque injuria. Where, however, the loss is inflicted for purposes other than that of seeking a direct economic advantage from the operation, an attempt is made to use the law of capture as an instrument to inflict injury deliberately. In such a situation, it would be reasonable to conclude that the privilege of inflicting loss no longer exists. That is, the privilege of producing from the common source of supply to the economic disadvantage of another owner may be exercised solely for the purposes of realizing direct economic gain and not for a sinister purpose of inflicting harm deliberately upon another.

FAIR OPPORTUNITY TO EXTRACT OIL OR GAS

At an early date, it was observed that proprietors have "coequal" or correlative rights to extract oil and gas from a common source of supply and that such rights may be protected by legislation designed to secure a "just distribution" of the oil or gas and to prevent one proprietor from taking an "undue proportion."[28] Whatever was meant by such early observation, it is now clear that what is sometimes referred to as the correlative right to a fair share of oil or gas from a common source of supply means that owners have the right to a fair opportunity to extract oil or gas. It does not mean that one proprietor may enjoin operations by another or may recover a share of oil or gas produced by another person who is particularly diligent or fortunate in developing the area first or otherwise is successful in capturing a greater volume of oil or gas than his neighbors. There has been no instance reported in which a court has allocated production among owners of land over a common source of supply or has determined, in the absence of waste in operations or conservation regulations, whether or not one owner was producing too much. On the contrary, it has been observed that such a problem is one to be presented to the appropriate conservation administrative body.[29]

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[24] Louisville Gas Co. v. Kentucky Heating Co., 132 Ky. 435, 437, 111 S.W. 374, 376 (1908).

[25] Kelly v. Ohio Oil Co., 57 Ohio St. 319, 49 N.E. 399, 39 A.L.R. 675 (1897).

[26] Louisville Gas Co. v. Kentucky Heating Co., 132 Ky. 435, 111 S.W. 374 (1908); Peterson v. Grayce Oil Co., 37 S.W.2d 367 (Tex. Civ. App. 1931), *aff'd* Grayce Oil Co. v. Peterson, 128 Tex. 550, 98 S.W.2d 781 (1936).

[27] United Carbon Co. v. Campbellsville Gas Co., 230 Ky. 275, 18 S.W.2d 1110 (1929); Jones v. Forest Oil Co., 194 Pa. 379, 44 Atl. 1074, 48 A.L.R. 748 (1900); Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714, 22 L.R.A. 141, 37 Am. St. Rep. 736 (1893).

The right to a fair opportunity to extract oil or gas from a common source of supply has been clearly recognized as a correlative right which must be protected when conservation regulations are imposed which limit the operation of the law of capture. When the right to produce oil or gas is curtailed or denied by conservation regulation, measures must be taken to assure owners equal opportunity to enjoy their fair share of production,[30] and a denial of such equal opportunity would amount to confiscation.[31]

When the number of wells is controlled by conservation regulation, the correlative right to a fair opportunity to extract oil or gas from a common source of supply may be validly recognized and protected by supplementary regulation apportioning production by forced pooling,[32] or granting exception wells and adjusting allowable production.[33] When marketing facilities are limited, regulation designed to protect the correlative right to a fair opportunity to produce and market is valid.[34]

Where, however, density of drilling is controlled under circumstances not amounting to confiscation, but no regulatory measures such as compulsory pooling exist to assure to owners a fair share of production, the Texas Supreme Court has refused to require apportioning of production from a common source of supply.[35] In other jurisdictions, the administrative establishment of a drilling unit has been held to have the effect of pooling the interests therein, requiring apportionment of production.[36] In Arkansas, a result similar to the one reached in Texas was reached where affirmative action to pool the tracts under existing law was not taken. The court, however, pointed out that there was no proof of drainage and implied that if drainage were proved production would be apportioned.[37]

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[28] Ohio Oil Co. v. Indiana, 177 U. S. 190 (1900).

[29] Magnolia Pet. Co. v. Blankenship, 85 F.2d 553 (5th Cir. 1936), *cert. denied* 299 U.S. 608 (1936), *rehearing denied* 299 U.S. 624 (1937).

[30] Marrs v. Railroad Comm., 142 Tex. 293, 177 S.W.2d 941 (1944).

[31] Railroad Comm. v. Magnolia Pet. Co., 169 S.W.2d 253 (Tex. Civ. App. 1943).

[32] Hunter Oil Co., Inc. v. McHugh, 320 U.S. 222 (1943); Patterson v. Stanolind Oil & Gas Co., 305 U.S. 376 (1939); Marrs v. City of Oxford, 32 F.2d 134 (8th Cir. 1929), *cert. denied* 280 U.S. 573 (1929); Hunter v. Justice's Court, 36 Cal.2d 315, 223 P.2d 465 (1950); Superior Oil Co. v. Beery, 216 Miss. 664, 63 So.2d 115, 2 O&GR 193 (1953).

[33] Sohio Pet. Co. v. Parker, 319 P.2d 305 (Okl. 1957).

[34] Cities Service v. Peerless Oil & Gas Co., 340 U.S. 179 (1950); Anderson-Prichard Oil Corp. v. Corp. Comm., 207 Okl. 686, 252 P.2d 201, 5 O&GR 99 (1955).

In conservation administration, the allocation of production from a common source of supply requires a criterion. Allocation of production from small drilling units is on the basis of surface acreage overlying the common source of supply. Such basis is reasonable as a matter of convenience and necessity. When, however, a greater area is involved, the criterion applied gives considerable insight into the matter of the right being protected by allocation of production. In the instances where the problem has been examined carefully, it is apparent that determining the fairness of allocation ultimately involves a determination of what proportion of the common source of supply could have been produced from a particular tract without waste under the law of capture in the absence of regulation. This is apparent when factors such as porosity and permeability of the sands and location on the structure are considered along with acre feet of saturated sands underlying a particular tract.[38]

CONCLUSION

It might be observed that, although the term "correlative rights" may be used loosely as a general reference to a great body of rights and duties arising between and among owners of mineral interests, it certainly does not conceal some mysterious and bewildering concept. It is a simple doctrine that owners of rights in a common source of supply may not inflict loss upon one another by conduct which is considered to be socially undesirable. The owners in the common source of supply operate in a special community, and the social acceptability of conduct within such community must be determined, not only by applying the standards applicable to conduct generally, but by also considering the utility of the conduct in the light of its peculiar consequence to others operating in the same community.

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[35] Ryan Consolidated Pet. Corp. v. Pickens, 285 S.W.2d 201, 5 O&GR 99 (Tex. 1955); Nale v. Carroll, 289 S.W.2d 743, 5 O&GR 1379 (Tex. 1956).

[36] Superior Oil Co. v. Beery, 216 Miss. 664, 63 So.2d 115, 2 O&GR 193 (1953); Griffith v. Gulf Ref. Co., 215 Miss. 15, 60 So.2d 518, 1 O&GR 1627 (1952); Wood Oil Co. v. Corp. Comm., 205 Okl. 534, 239 P.2d 1021, 1 O&GR 132 (1950).

[37] Grayson v. Berry Asphalt Co., Inc., 219 Ark. 447, 243 S.W.2d 1, 1 O&GR 5 (1951).

[38] See, for example, Woody v. Corp. Comm., 265 P.2d 1102, 3 O&GR 465 (Okl. 1954); Anderson-Prichard Oil Corp. v. Corp. Comm., 207 Okl. 686, 252 P.2d 450, 2 O&GR 234 (1953).

Perhaps most important, it should not be concluded that there is a special correlative rights doctrine which renders the rule of capture obsolete, and which is designed to assure to each owner an ascertainable share of the common source of supply to be derived from calculations designed to do complete justice. Correlative rights are complementary to the rule of capture in that they provide the refinements of law required to describe fair play under that rule.

FEDERAL INCOME TAX DEDUCTIONS OF BAWI LEASEHOLD PAYMENTS

*Shirley Norwood Jones**

There is ever increasing interest in Mississippi in the State's efforts, through its Agricultural and Industrial Board, to obtain industry for Mississippi. All of us are familiar with the State's program to Balance Agriculture with Industry, often referred to as the BAWI program. Efforts are constantly being made, not only in Mississippi but also in other states, to secure more favorable conditions for industry.

There have been 144 new industries established and 47 expansions of existing industries in Mississippi under the BAWI program since it was first enacted into law in 1936.[1] An example of a typical BAWI lease is that of Gem, Inc., a small factory in Byhalia, Marshall County, Mississippi. Dozens of other plants are using a similar type of lease in the State of Mississippi. It is the similarity of these leases that makes the Tax Ruling received by Gem, Inc., important.

Gem, like many of the BAWI factories, is operating (to summarize briefly) under a 20-year lease with options to renew. The property rented consists of a factory building constructed under Mississippi's Balance Agriculture with Industry program and financed by a bond issue. Under such a contract the county or political subdivision acquires title to the land and has a factory building erected on the land. The county finances the contract by issuing full faith and credit bonds. The rental for the leased premises is usually set at a sum which is sufficient to relieve the county of the obligation to levy taxes to meet the maturities of principal or interest of any of the bonds. Such a lease customarily provides for termination if operations cease for a period of one (1) year. The contract usually provides for renewal periods; in Gem's case for three (3) additional periods of twenty (20) years each and one (1) period of nineteen (19) years. The rental after the primary term of the lease is usually considerably less than the rental which has previously been paid in order to pay off the bonds. The agreement is subject to termination if the factory defaults in payment of rent.

The local office of the Internal Revenue Service for Gem's District raised the question of whether these leasehold payments could be deducted as rent when paid or whether they must be amortized over the useful life of the premises and only 1/40 or 1/50 of the total rent deducted in one year, depending on whether the useful life of the premises is 40 or 50 years. A request was made by the local office of the Internal Revenue Service to the Washington office, Tax Rulings Division of the Treasury Department. Two principal issues were involved in the Request for Ruling.

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[1] Information furnished by Henry Maddox, Chairman, Mississippi Agricultural and Industrial Board.

1. Whether amounts paid Marshall County over the primary term of the lease, plus the amounts provided for in the renewal clause, are payments for the acquisition of a beneficial interest which should be amortized over the estimated useful life of the premises; and

2. Is there such a reasonable certainty that Gem, Inc. will renew its lease that the payments made by Gem should be spread over the estimated life of the premises?

To sum up, the problem is whether or not payments made under BAWI leases as rental are in fact rental at all or whether these payments are to be treated as if they were payments on the purchase price of a building which must be amortized over the useful life of the premises.

The factories which deduct their payments as rent do so under Section 162 of the Internal Revenue Code of 1954 which provides, insofar as pertinent, as follows:

> "(a) IN GENERAL. – There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business including—
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> * * * * *
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> "(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

Every factory which comes into a town or community under the Mississippi BAWI Law comes into the community with two primary obligations under its lease. The first obligation is the payment of rent, usually in a sum sufficient to discharge the bonds and coupons issued by the municipality as they mature, and the second obligation is the continued operation of a manufacturing plant of the character prescribed in the lease so as to provide employment in the community.

Every BAWI lease contract carries this additional requirement of operation of the industry in order to provide employment. This is an important obligation and is an obligation read into the contract by the Mississippi Supreme Court, even in those instances where no reference is made to continued operation in the actual lease.[2]

The original Balance Agriculture with Industry program was enacted into law in 1936.[3] At that time the State was in an acute economic emergency which the BAWI program was designed to alleviate. The present BAWI program appears as Sections 8936 through 8936-24 of the Mississippi Code of 1942, as amended.

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[2] Albritton v. City of Winona, 181 Miss. 75, 177 So. 799 (1938).

These statutes state that the program is demanded by public policy. Under the above mentioned sections of the Code the Agricultural and Industrial Board is charged with the duty of making effective the public policy as declared in the Act. The Mississippi statute is so written that the bonds must mature annually with all maturities not longer than twenty-five (25) years.[4] In conformity with the A. & I. Board's general policy, the Board requires that the rental payment specified in the lease shall be such annual sums as will enable the county each year to pay the principal and interest of the bonds as they mature.

The Mississippi Supreme Court has clearly pointed out that it is necessary that the lessee be required to operate the plant in order to have a valid BAWI lease.[5] It is carefully pointed out that the enterprise must be for a public purpose and not simply in aid of private individuals. The lease must be of such character as will insure the continued operation of the proposed industry with power in the municipality, under the supervision of the A. & I. Board, to enforce continued operation.

The present policy of the A. & I. Board requires the county or municipality to set the rentals high enough to cover all costs during the primary term of the lease. The BAWI policy is designed to make the chances reasonable that a particular lease will pay its own way and pay out its bonds without principal and interest having to be raised from the citizens of the county by taxation. The length of the primary term of the lease is geared to the maturity dates of the bonds, and the maturity dates of the bonds are primarily determined by the county and the potential buyers of the bonds.

The Ruling received by Gem can be summed up by the following quotation:

> "Contrary to the taxpayer's position, as outlined in summary above, it is the view of this office, based upon the information available and the authorities cited hereinafter, that the aggregate amount of rentals payable over the period corresponding to the estimated useful life of the improvements should be spread in aliquot parts over such period. In other words, the total rentals payable by a lessee over the period of the useful life of property (where the combined terms of the lease available to the lessee extend beyond such useful life) should not be attributed in any greater pro-

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[3] Senate Bill No. 1, c. 1, Gen. Laws Miss., 1st Extra Sess., 1936.
[4] Miss. Code Ann. § 8936-13 (1942).
[5] Albritton v. City of Winona, 181 Miss. 75, 177 So. 799 (1938).

> portion to one year, or years, than to others of the same tenure in the absence of a prospective and definite showing that there will be a variation in value of the beneficial use."

Insofar as Gem's situation is similar to that of other BAWI industries, this Ruling means that the Internal Revenue Service will probably take the position that rentals paid by an industry under a BAWI lease contract must be spread ratably over the life of the assets where the industry has an option to renew the lease at the end of the primary term.

This Ruling would mean that the industry would be paying the contractual rental annually but would not be allowed to deduct, for income tax purposes, all of the payment as an expense of doing business.

To the contrary, the industry would be treated as if, in effect, it owned the building. The industry would not depreciate the property but would have to take the total amount of rent paid over the estimated life of the premises (for example 50 years) and deduct in a given year only one-fiftieth of the total amount of rent paid. This would mean that if a BAWI building has a reasonable life of 50 years and is leased with a primary term of 20 years at $10,000 rental per year with options to renew for successive periods at say $100 per year, the Internal Revenue Service would add the total payments during the primary term, which would be $200,000, to the payment for the next 30 years, which would be $3,000, getting a total of $203,000. The industry would then be allowed to deduct each year only $4,060 although during the first 20 years the industry is required by contract and by the policy of the State of Mississippi to pay $10,000 per year rent in order to fully pay for the improvements in the primary term.

Under this Ruling, the Internal Revenue Service is treating payments made by BAWI lessees as being like lump sum payments for the acquisition, assignment or cancellation of a lease.[6] The sums paid as rent are being prorated over the useful life of the premises even though the evidence shows that the rent paid is reasonable—that in no year does the rent exceed the fair rental value of the lease premises. Furthermore, in BAWI transactions, we have parties acting at arm's length. One important factor, as pointed out by the Fifth Circuit,[7] was the arm's length nature of the transaction. The Fifth Circuit stated—

"The R. F. C. was not an eleemosynary institution and was not in

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[6] Cases cited by the Internal Revenue Service include the following: Wells Fargo Bank & Union Trust Co., 163 F.2d 521 (9th Cir. 1947); Home Trust Co., 65 F.2d 532 (8th Cir. 1933); Steele-Wedeles Co., 30 B. T. A. 841 (1934); Harriet B. Borland, 27 B. T. A. 538 (1933); Henry B. Miller, 10 B. T. A. 383 (1928); J. Alland & Bro., Inc., 1 B. T. A. 631 (1925).

[7] Benton v. Commissioner of Internal Revenue, 197 F.2d 745 (5th Cir. 1952).

> collusion with taxpayer to evade the income tax. It was attempting to protect itself in the transaction by a lease. In case of default in rent it would be easier to gain possession from a tenant than to foreclose or forfeit a contract to purchase and dispossess a purchaser . . . ."[8]

The Court went on to state that if the parties in good faith actually intended to enter into a lease contract, then the taxpayer up until the time that he exercised an option to purchase acquired no title to or equity in the property. The Court pointed out that the mere hope of exercising an option does not create an equity. In this case and in other cases[9] the Court sustained the right of the taxpayer to deduct as rent, payments made under a lease with an option to purchase. BAWI plants do not even have an option to purchase. BAWI factories cannot be said to be acquiring an equity in the premises, when under the laws of the State of Mississippi if they ever purchase these premises they must pay a fair and reasonable value for them above what has previously been paid as leasehold rental. Section 95 of the Mississippi Constitution of 1890 provides that lands belonging to or under the control of the State shall never be donated directly or indirectly to private corporations. Such lands must be sold for a fair and adequate consideration and Section 100 of the Mississippi Constitution of 1890 forbids the release of any obligation owned by the State.

Necessarily, in reaching the conclusion quoted above that the rents should be spread over the useful life of the premises, the Service must find that there is a reasonable certainty that the taxpayer will renew its lease at the end of the primary term of twenty years. Section 1,162-11-(b)(1) of the Regulations provides in part as follows:

> "Where there is a possibility that the lease may be renewed, the matter of spreading such costs over the term of the original lease, together with the renewal period or periods, depends upon the facts in the particular case, including the presence or absence of an unexercised option of renewal and the relationship between the parties. As a general rule, unless the lease has been renewed or the facts show with reasonable certainty that the lease will be renewed, the cost or other basis of the lease, or the cost of improvements shall be spread only over the number of years the lease has to run without taking into account any right of renewal."

The corresponding provisions of Section 39.23(a)-10(b) of Regulations 118 are substantially to the same effect. A number of cases have upheld deductions over the period of the original lease.[10]

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[8] Ibid.

[9] Breece Veneer & Panel Co. v. Commissioner of Internal Revenue, 232 F.2d 319 (7th Cir. 1956); Fishing Tackle Products v. Commissioner, 27 T. C. 638 (1957).

The important factor in such a case is whether there is a reasonable certainty of renewal? Without a reasonable certainty of renewal, there is no justification for a requirement that leasehold rentals be amortized over the entire period of the lease. The Internal Revenue Service has again recognized the theory of a reasonable certainty to renew in I. T. 3366, C. B. 1940-2 at Page 65 where rental deductions were allowed after the Service found that the facts did not show with a reasonable certainty that the lease would be renewed.

The principles announced in the cases and rulings in determining the length of time over which improvements are to be amortized or depreciated under a lease containing a renewal option, should be equally applicable in determining whether the payments under the lease in the BAWI lease instances are in fact payments of current rent as contended by the taxpayers. Furthermore, the time to be considered[11] is the time when the contract was originally executed, not years later when the actual question of renewal comes up for final decision.

The factors used by the Internal Revenue Service in finding a reasonable certainty of renewal for Gem, Inc., are to a large extent applicable to all BAWI industries. The very fact that the A. & I. Board approved the industry in the first place is a factor being used against an industry's contention that there is no reasonable certainty of renewal. This was pointed out in the Ruling received by Gem as follows:

> "At the outset, it could hardly be denied that chances for the financial success of this enterprise were at least reasonably good if reliance may be placed on the judgment of those charged with the responsibility for its launching. Copies of documents received indicate that the Governor of The State of Mississippi acted in the capacity of Chairman of the Executive Committee of the Board of Directors of the Mississippi Agricultural and Industrial Board which was in active control of the BAWI program.
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> "In addition to the attention given by representatives of the State at the highest level of authority, numerous other responsible officers of the commonwealth, as well as the electorate of the particular subdivision involved were required to pass upon the desirability of establishing the business. Thus, there can be no question as to the qualifications of the responsible parties, nor that there was painstaking consideration and forethought given to its institution

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[10] Bonwit Teller & Co. v. Commissioner, 53 F.2d 381 (2nd Cir. 1931); Halsam Products Co. v. Commissioner, 11 T. C. M. 87 (1952); 1620 Broadway Corporation v. Commissioner, 36 B. T. A 149 (1937).

[11] Benton v. Commissioner, 197 F.2d 745 (5th Cir. 1952).

> particularly in view of the fact that failure would necessitate the levying of taxes by Marshall County to meet the bonded liability incurred for the venture's financing."

The Internal Revenue Service also considers the financial condition of the industry at the close of the taxable year involved.

There are many factors which enter into the continuation of a business, among which are the economic factors, including labor supply, payroll, etc. Under a BAWI lease the amount of the rent is only one, and certainly not the primary, consideration which will determine whether the options will be exercised. When a plant exercises a BAWI option and remains at what may seem to be a small rental, it must be taken into consideration that this plant is binding itself for a period of fifteen (15) to twenty-five (25) additional years to maintain a payroll in the community. Under the BAWI leases the entire transactions are handled at arm's length. The leases must be drafted so as to comply with the Constitution of the State of Mississippi and with the laws of the State and so as to meet the approval of the municipality and the approval of the A. & I. Board. By the time all of these bodies have been satisfied there can be no interdealing for individual advantage. And finally, suppose that the taxpayer is made to amortize over a forty (40) or fifty (50) year period rather than over the twenty (20) year period of a typical BAWI lease. This would mean that from approximately one-half to three-fifths of the total rental payments paid by the plant during the primary term of the lease would be deductible by the taxpayer in the final year that it operated the factory, should it finally decide not to exercise its option to renew. If a plant decided not to renew its lease, the probabilities are very great that it would have little or no income in that final year. In this case there would be little income against which to offset one-half to three-fifths of the total rental payment of the least which the taxpayer had not been allowed to deduct over the period of the lease.

One further question remains, and that is the effect of Section 15 of the Technical Amendments Act of 1958 on Mississippi's BAWI program. This Section amends Part VI of subchapter B of Chapter 1 (itemized deductions for individuals and corporations) by adding at the end thereof a new section:

> "(a) General Rule. — Except as provided in subsection (b), in determining the amount allowable to a lessee as a deduction for any taxable year for exhaustion, wear and tear, obsolescense, or amortization—
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>> "(1) In respect of any building erected (or other improvement made) on the lease property, if the portion of the term

> of the lease (excluding any period for which the lease may subsequently be renewed, extended, or continued pursuant to an option exercisable by the lessee) remaining upon the completion of such building or other improvement is less than 60 percent of the useful life of such building or other improvement, or
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> "(2) in respect of any cost of acquiring the lease, if less than 75 percent of such cost is attributable to the portion of the term of the lease (excluding any period for which the lease may subsequently be renewed, extended, or continued pursuant to an option exercisable by the lessee) remaining on the date of its acquisition,

"the term of the lease shall be treated as including any period for which the lease may be renewed, extended, or continued pursuant to an option exercisable by the lessee, unless the lessee establishes that (as of the close of the taxable year) it is more probable that the lease will not be renewed, extended, or continued for such period than that the lease will be so renewed, extended, or continued.

"(b) Related Lessee and Lessor. — (Should not affect the BAWI Program.)

* * * * *

"(c) Reasonable Certainty Test. — In any case in which neither subsection (a) nor subsection (b) applies, the determination as to the amount allowable to a lessee as a deduction for any taxable year for exhaustion, wear and tear, obsolescence, or amortization—

> "(1) in respect of any building erected (or other improvement made) on the lease property, or
>
> "(2) in respect of any cost of acquiring the lease, shall be made with reference to the term of the lease (excluding any period for which the lease may subsequently be renewed, extended, or continued pursuant to an option exercisable by the lessee), unless the lease has been renewed, extended, or continued or the facts show with reasonable certainty that the lease will be renewed, extended, or continued."

While the act apparently applies only to the construction of improvements made by a tenant as set out in subsection (a)(1) or to the cost of acquiring a lease as set out in subsection (a)(2), it is possible that BAWI leases might be construed by the Internal Revenue Service to come under subsection (a) (2) as being payments made in acquisition of a lease. If so, the taxpayer is given not the burden of showing that there is no reasonable certainty of renewal but the burden of showing that the probabilities are in favor of non-renewal.

Subsection (c) as quoted above puts into the law what was formerly only in the Regulations.

AN ODDITY IN SALES LAW — THE SEARLES CASE

Hector Currie[*]

Suppose that S contracts to sell and deliver a quantity of corn to B. Wishing his money without delay he arranges for the X Bank to discount his draft on B for the price. When the corn has been shipped, S brings the bill of lading to the X Bank and draws a sight draft for the agreed sum. (Either the draft will be drawn to the X Bank's order or if drawn to S's order it will be indorsed in blank; same for the bill of lading.) The X Bank takes the bill of lading and the draft, pays or credits to S the face amount of the draft minus a small discount, and forwards the draft, with bill of lading attached, to the Y Bank in B's city. The Y Bank presents the draft to B for payment. When B has paid the draft, he is given the bill of lading and he gets the corn. Suppose that the corn is defective in quality or deficient in amount and that B consequently has an action against S for breach of contract. Has he the same action against the X Bank? In Mississippi, within limits to be noticed shortly, the answer is yes.

According to Williston this "novel doctrine"[1] had its origin in *Landa v. Lattin*,[2] decided by the Texas Court of Civil Appeals in 1898; however, *Miller v. American National Bank*,[3] a Mississippi case decided a few weeks earlier, raised the same issue and reached the same result. It was held in the *Miller* case that the buyer had the same rights against the seller's assignee as against the seller "whether the bill of lading vested the title" in the assignee or not, but the short opinion stated no grounds for this conclusion. Four years later, in *Searles Bros.* v. *Smith Grain Company*,[4] the problem came up again. This time our Court endorsed the reasoning of *Landa* v. *Lattin* and adopted language to the effect that by taking the bill of lading the bank became owner of the goods and undertook performance of the seller's contract. At the end of a very long quotation from *Landa v. Lattin*, Chief Justice Whitfield added these words of his own: "We think the courts which have taken the other view have dealt with half the transaction—not the whole of it. They have looked to the draft, not to the bill of lading. They have failed to give every factor in the transaction its full significance, and to look through form to substance."[5] This statement suggests again that liability resulted from the taking of the bill of lading. But why should the taking of the bill of lading have this effect? It is obvious that the bank got only a limited interest, for while "form" may suggest that the bank had absolute title, "substance" leaves no doubt that the bank took the bill of lading as it might in other circumstances have taken a mortgage or pledge. In other words, the bank did not buy corn from S and sell it to B in such a way as to authorize an inference that it was adopting S's representations; rather, it bought S's draft on B and took the bill of lading as collateral security for the draft. Accordingly, the *Searles* case itself seems an example of looking at half a transaction and basing a decision not on substance but on form.

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[1] 2 Williston, Sales §435 (Rev. ed. 1948).

[2] 19 Tex. Civ. App. 246, 46 S.W. 48 (1898).

[3] 76 Miss. 84, 23 So. 439 (1898).

[4] 80 Miss. 688, 32 So. 287 (1902).

[5] *Id.* at 699, 32 So. at 290.

There is another reason why the *Searles* case seems erroneous. The action is described in the report as an attachment in chancery[6] against Smith Grain Company, the seller; Exchange National Bank of Little Rock, Arkansas, which had bought the drafts; and two banks in Vicksburg which had presented the drafts to the buyer for payment and were retaining the proceeds as the Mississippi statute[7] directed them to do. Smith Grain Company did not answer. Exchange National Bank in its answer relied upon Rev. Stat. §5242 (1878)[8] providing that " . . . no attachment, injunction, or execution, shall be issued against such association [a National Bank] or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." This statute was applicable[9] and it should have been controlling.[10] The Court, however, held that the action might proceed as the national bank was "a mere claimant of the fund"[11]—words explained in a later case as meaning that "the attachment was manifestly dealt with by the court as being primarily against Smith Grain Company."[12] But this explanation fails to convince. The national bank did not receive the drafts as agent for collection, it bought the drafts; consequently, the garnishee banks were indebted not to Smith Grain Company but to it. Smith Grain Company in this situation had nothing to be attached. The national bank was not "a mere claimant of the fund"—it was the only claimant.

Searles Bros. v. *Smith Grain Company* has been followed in later Mississippi cases[13] and described as "the settled law of this state."[14]

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[6] See Miss. Code Ann. §§2729-2734 (1942).

[7] Miss. Code §4300 (1892), Miss. Code Ann. §7881 (1942).

[8] 12 U.S.C. §91 (1952).

[9] It includes garnishment in attachment. National Bank of St. Louis v. Stupp Bros. Co., 147 Miss. 747, 113 So. 340 (1927).

[10] *Cf.* First Nat. Bank v. Mississippi Cottonseed Products Co., 171 Miss. 282, 157 So. 349 (1934); Aldridge v. First Nat. Bank, 165 Miss. 1, 144 So. 469 (1932); National Bank of St. Louis v. Stupp Bros. Co., 147 Miss. 747, 113 So. 340 (1927).

[11] 80 Miss. at 699, 32 So. at 290 (1902).

[12] National Bank of St. Louis v. Stupp Bros. Co., 147 Miss. at 757, 113 So. at 341 (1927).

[13] Citizens Bank & Trust Co. v. Harpeth Nat. Bank, 120 Miss. 505, 82 So. 329 (1919); L. Marks Sons v. West Tenn. Grain Co., 119 Miss. 465, 81 So. 162 (1919); Mobile Auto Co. v. Sturges, 107 Miss. 848, 66 So. 205 (1914).

[14] First Nat. Bank v. Tchula Commercial Co., 132 Miss. 58, 95 So. 742 (1923).

While continuing to hold that a bank discounting a seller's draft and taking a bill of lading as security becomes liable as "substituted vendor"[15] or "co-warrantor"[16] of goods described in the bill of lading when the draft is paid, the court has declined to extend this liability to other, unrelated shipments from seller to buyer.[17] The rule of the *Searles* case, moreover, was greatly limited in scope by the adoption of the Federal Bill of Lading Act (Pomerene Act).[18] This statute provides that a holder of a bill of lading for security who "in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described."[19] It follows that in transactions across state lines, where the bill of lading was issued under the Pomerene Act, a discounting bank is no longer answerable for the goods.[20]

The result reached in the *Searles* case has been rejected by most courts that have considered the problem.[21] *Landa* v. *Lattin,* which furnished the basis for the *Searles* case, was followed for a time in North Carolina[22] and in Alabama.[23] The North Carolina court, however, changed its mind,[24] and the Alabama court later vitiated its decision by emphasizing[25] that the bank had in fact assumed the seller's obligation in the earlier case. Even *Landa* v. *Lattin* was overruled by the Supreme Court of Texas.[26] Mississippi seems to be the only jurisdiction where the doctrine still applies.

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[15] Exchange Nat. Bank v. Searles Bros., 81 Miss. 169 at 173, 32 So. 314 (1902).

[16] L. Marks Sons v. West Tenn. Grain Co., 119 Miss. at 473, 81 So. at 163 (1919).

[17] Branham v. Drew Grocery Co., 145 Miss. 627, 111 So. 155 (1927); Colonial Lumber Co. v. Andelusia Nat. Bank, 138 Miss. 566, 103 So. 343 (1925); Exchange Nat. Bank v. Searles Bros., 81 Miss. 169, 32 So. 314 (1902).

[18] 49 U.S.C. §§81-124 (1952).

[19] Id. §116. The same provision is found in Uniform Bills of Lading Act §37, 4 Uniform Laws Annotated 61, but UBLA is not in force in Mississippi.

[20] First Nat. Bank v. Tchula Commercial Co., 132 Miss. 58, 95 So. 742 (1923).

[21] Cases are collected in 2 Williston, Sales §435 n.16 (Rev. ed. 1948). There is a general recognition that banks do not intend to assume liability for goods and that to impose such a liability hampers the banking business. Banks could protect themselves through use of apt language in their indorsement of a draft and bill of lading, and if all were aware of the danger all would undoubtedly do so.

[22] Finch v. Gregg, 126 N.C. 176, 35 S.E. 251 (1900).

[23] Haas v. Citizens' Bank, 144 Ala. 562, 39 So. 129 (1905).

[24] Finch v. Gregg, supra note 22, was overruled by Mason v. Nelson, 148 N.C. 492, 62 S.E. 625 (1908).

[25] First Nat. Bank v. Wilkesbarre Lace Mfg. Co., 162 Ala. 309, 50 So. 153 (1909).

[26] S. Blaisdell Co. v. Citizens Nat. Bank, 96 Tex. 626, 75 S.W. 292 (1903).

REMEDIES AND PROCEDURE IN A TAX CASE

*Joe Crawford**

The amount of tax shown to be due on the return of a taxpayer is commonly referred to as a "self-assessment." This amount, corrected for mathematical errors, is assessed by the Director of Internal Revenue for the district in which the return is filed.[1] If a deficiency in income, estate or gift tax is detected under routine examination of incoming returns, it may neither be assessed nor collected, absent a situation in which the Director feels the revenue is in jeopardy, until the taxpayer has an opportunity for both administrative and judicial determination.[2]

When a return appears to be irregular, it is assigned to an internal revenue agent for audit. Some returns are selected for examination because of the large amount of income involved, and, others, because of obvious discrepancies. There is no substitute for a clear and adequate presentation of a transaction in the return. It takes less effort to convince the Internal Revenue Service that the return is proper on its face and should not be selected and sent to the field for audit than it will take to satisfy a revenue agent that there is no tax deficiency after the return has been assigned to him for examination.

Often advice from tax counsel is not sought until after the internal revenue agent has completed his investigation and issued a report setting forth his proposed findings of deficiency. There is need for competent tax advice from the moment the taxpayer is notified that his return is to be audited. The propitious time to win a tax dispute is in its beginning, before, in fact, it has become a dispute and during the examination of the return by the agent. Competent tax counsel may persuade the agent to accept a favorable theory at the inception of an examination. Less evidence is ordinarily required to satisfy the agent than is needed to satisfy his superiors, and than is necessary to prevail in court.

Almost every third case which reaches the courts today involves the civil fraud penalty. While the criminal sanctions of the Internal Revenue Code are not as frequently invoked, it is of little comfort to the taxpayer to be told that the government has the burden of proof in a fraud issue, and that, if he is indicted, the charge has to be proved beyond a reasonable doubt.

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[1] Int. Rev. Code §§ 6201 (a) (1) - 6213 (b), 26 U.S.C. §§ 6201 (a) (1) - 6213 (b) (1954).

[2] Ibid. at §§ 6213 (a) - 6216 (2).

When tax evasion is suspected a special agent of the intelligence division is near at hand. It is the duty of these agents to obtain evidence for prosecution in fraud matters. Their investigation is to be distinguished from a routine examination where a tax return is assigned to a revenue agent for the purpose of determing if the correct income has been reported. The special agent is adroit in his methods of investigation and it is often difficult to detect when he has entered the scene. His presence is not generally known until he has developed damaging evidence. Agents in the revenue service ordinarily present credentials showing their authority to make investigations. It is always wise to check an unknown agent's identity. A quick look at his pocket commission will reveal whether he is a revenue agent or a special agent.

It cannot be urged too strongly that prompt advice from a lawyer is needed when the taxpayer becomes suspect. At the investigative stage of a case, sound and effective representation can mean the difference between a prosecution or a civil claim for a deficiency, or neither. Without representation many taxpayers unwittingly waive their constitutional privilege against self-incrimination, and make false statements which are later used against them. Prior to 1951, taxpayers had the advantage of defenses which did not go to the merits of a case in the government's "health" and "voluntary disclosure" policies which were used to stave off criminal action. Today, the taxpayer's only defenses are embodied in the Fourth and Fifth Amendments to the United States Constitution and in the criminal law. Whenever it is felt that certain evidence might form the basis of an indictment, it should not be revealed except on concessions quid pro quo.

The taxpayer is afforded many conferences with administrative officials in both criminal and civil tax matters. These conferences can, and quite often do, turn into "fishing expeditions" both for the government and the taxpayer. Of course, the taxpayer's attorney will be better able to evaluate the merits of his case after such a conference, but the converse may be the result if he is not careful. This is especially so if the discussion involves either the civil or criminal aspects of a fraud charge. It is well for the attorney to remember that he, in most instances, knows more about the taxpayer's affairs than the government has been able to uncover. If criminal action is imminent, negotiations toward civil settlement are held in abeyance. This is so because it is felt by the government that any steps taken toward settlement of civil issues might prejudice the criminal case. Taxpayers most often would prefer to pay a large civil fraud penalty and forget the criminal sanctions. This is not possible under present policy.

Suppose that criminal proceedings are contemplated by the government. The taxpayer's lawyer may confer with the special agent and his group supervisor to convince them that they do not have sufficient evidence to support a criminal conviction. If he is not successful, the special agent's report, recommending prosecution, will be transmitted for review to the chief of the intelligence division in the director's office. At this stage, the attorney may be able to persuade the agent in charge that the evidence is not sufficient to comprise all the elements necessary for a criminal prosecution. If the attorney is not successful at this juncture, the special agent's report will be forwarded by the chief of intelligence to the assistant regional commission, intelligence, for screening, and then to the regional office for the chief counsel of the Internal Revenue Service.

A conference may be arranged with the regional counsel's attorney in the enforcement division. If taxpayer's counsel is unable to convince enforcement counsel that the government lacks a prima facie case, the taxpayer's file will be sent to the criminal division of the Department of Justice. Again a conference may be advisable. Attorneys in this office review cases on a nation-wide basis and may be better able to determine overall weaknesses in the government's case. In the event the attorney in charge in the Justice Department decides to forward the case to the United States Attorney for the district in which the taxpayer resides with a recommendation for prosecution, there is still an opportunity to persuade the United States Attorney that he has a weak case.

Even if the United States Attorney is adamant, the grand jury may not vote a true-bill. A grand jury is not held accountable for its decisions and an indictment might not be voted by the jury. If an indictment is brought forth by the jury, the taxpayer's lawyer will have to use all his skills as an advocate to convince the jury in the federal district court that his client is innocent of criminal intent to evade taxes and that, if he is guilty of anything at all, it is owing the government some taxes which should be taken care of in a civil proceeding. Taxpayer's counsel might give some consideration to a plea of nolo contendere. Some judges are known to be lenient.

Assume that only civil tax matters are in controversy or that the criminal aspects of the case have terminated. What consideration must the tax lawyer give to his client's problems? He has certain alternative remedies and procedures which may be followed.[3] After completing his examination, the revenue agent will inform the taxpayer of his proposed findings and of any proposed overassessment or deficiency. The taxpayer may agree to the findings and sign a waiver allowing assessment and collection of the deficiency[4] or the acceptance of the proposed overassessment. A request for an informal hearing before the agent's group supervisor may be made if the taxpayer does not agree to the agent's findings.

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[3] Statement of Procedural Rules, Title 26, Code of Federal Regulations, Part 601 (1958 C.C.H. Standard Federal Tax Reports, Volume 5, Para. 5996 et seq.).

[4] Int. Rev. Code § 6213(d), 26 U.S.C. § 6213(d) (1954).

If a taxpayer fails to request a hearing before the group supervisor or disagrees with the decision reached by the agent's group supervisor after the hearing, a revenue agent's report, popularly referred to as an "R.A.R.," is issued. The revenue agent's report summarizes the agent's findings and sets forth any proposed deficiency. This report, of course, also may recommend an overassessment which is unacceptable to the taxpayer.

Occasionally, the taxpayer has been abrupt with the examining agent or failed to supply all the facts necessary to support his view. It is a mistake to treat revenue personnel curtly. When treated fairly, they have been known to point out errors made in the government's favor which would entitle the taxpayer to a refund.

The facts should never be misrepresented. Development of the facts to coincide with a tax theory is necessary, of course. Misleading statements and concealment of material facts, however, are never justified. A tax attorney has a duty to his client, to his profession, to his government, and to himself to be honest in his presentation of the facts. This does not mean that he is required to point out the bad facts, the agent will do that soon enough. Often it is better for the lawyer to bring such facts to light rather than to have them come out at an inopportune moment.

An index to a tax attorney's future success in tax negotiations is predicated upon the manner in which he has conducted himself before revenue personnel. He should keep this relationship on a high plane—a business-like basis. Attempts to gain good will through favors and gifts are embarassing to career employees and tend to create suspicion of motives. For the most part employees of the revenue service strive to find the correct answer to a tax problem. They are honest and try to do a good job for their government. It must be remembered, however, that employees of the revenue service are partisan in their attitude, and this is only natural since it is their job to protect the government's revenue. It will be difficult on occasions to convince them that there is any merit in the taxpayer's side of the case. They are only human and if the taxpayer or his counsel enters into negotiations with a "chip on his shoulder" or an air of superiority, opportunity for settlement is negligible.

If the taxpayer does not agree to the proposed deficiency after the hearing before the agent's group supervisor, he may file a formal protest with the office of the district director. This protest must be filed within thirty days after the date of the letter transmitting the revenue agent's report to the taxpayer and, for this reason, the letter of transmittal is commonly referred to as a "thirty day letter." After a protest is filed, the taxpayer's case is transferred to the regional appellate division for the Commissioner of Internal Revenue. (When criminal prosecution is contemplated the case is not referred to the appellate division.) The hearing on the protest is informal and testimony is not under oath.

When an agreement is not reached after the taxpayer has filed a protest the assistant regional commissioner, appellate, will send a "notice of deficiency" by registered mail to the taxpayer's last known address.[5] If a protest was not filed the district director issues the statutory notice of deficiency. A taxpayer living in the United States has ninety days after the date of the deficiency notice in which to file a petition with the Tax Court.[6] For this reason, the letter transmitting the notice of deficiency is often referred to as a "ninety day letter."

Should a protest be filed with the appellate division? This is always a difficult decision. Technical advisors in the appellate division are chosen from agents in the field for their demonstrated ability in tax matters. They are skilled tax men. If a protest is filed, the technical advisor to whom the case is assigned may detect new issues which can be raised in the notice of deficiency, and, if this is done, the taxpayer will have the burden of proof on the issues so raised. It is also possible to increase the amount of deficiency without adding issues. Moreover, the notice of deficiency is prepared by the appellate division when a protest has been filed and is reviewed by the regional counsel's office. Thus, the explanatory paragraphs in the statutory notice which inform the taxpayer of the nature of and the basis of the deficiency are usually drawn with more care than if the notice had been prepared in the director's office.

New issues are seldom raised in the commissioner's answer when tax counsel has by-passed the appellate division and filed a petition with the Tax Court, because the government would then have the burden of proof. Nor is the amount of deficiency normally allowed to be increased after the statutory notice of deficiency has been mailed to the taxpayer.[7]

If a protest is filed and there is no settlement, the attorney in the regional counsel's office to whom the case eventually may be assigned for trial in the Tax Court will have the benefit of the taxpayer's written protest, the technical advisor's notes taken during conferences, and his report citing authority for the government's position. As a rule, a docketed case which is at issue will be dormant for many months awaiting the date of trial. The attorney for the commissioner has many cases assigned to him for possible trial. He, therefore, derives a distinct advantage in having this data to assist him over a long period of time.

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[5] Ibid. at § 6212 (b).
[6] Ibid. at § 6213 (a).
[7] Ibid. at § 6212 (c).

For these reasons many practitioners prefer not to file a protest with the appellate division. Each case stands upon its own footing and no precise answer can be given as to when a protest should or should not be filed.

To the advantage of filing a protest it may be said that the primary function of the appellate division is to settle cases and the majority of tax issues are settled with them when a protest is filed. Most cases do not go to trial when the technical advisor has been presented with an offer in settlement adequately reflecting the merits of the case. Also, the filing of a protest will defer the time when a decision must be made to appeal to the Tax Court or make a claim for refund in the event the case is not settled.

If the controversy is not settled at the conference with the appellate division, or no protest is filed, the taxpayer must file a timely petition with the Tax Court or pay the amount of tax liability set forth in the statutory notice of deficiency. As an alternative to having his income, gift, or estate tax liability determined by the Tax Court, or as a means of obtaining a judicial determination of his liability for other taxes over which the Tax Court has no jurisdiction, such as excise and employment taxes, the taxpayer may pay the tax and sue for a refund.[8] (Although taxes other than income, estate and gift may be assessed and collected prior to administrative and judicial determination, collection efforts are usually not attempted until the taxpayer has had an opportunity for administrative hearing.) If a claim for refund is timely filed with the district director, suit for recovery of the tax may be brought either in the United States District Court or the United States Court of Claims. Although concurrent jurisdiction exists, jury trials are available only in the district courts.

When tax litigation cannot be avoided, the selection of an appropriate forum for a hearing must be made. The early choice of the proper court for adjudication of the issues involved is important. (This problem should be given consideration prior to administrative hearing.) In making the selection, tax counsel must carefully read and analyze the decisions of the Tax Court, the Court of Claims, and the District Court and Court of Appeals. He must also find if the Supreme Court has reviewed any of the issues involved in his case. His choice will, of course, be predicated upon favorable cases and precedent.

Unless the Supreme Court has overruled a tax court decision, it may have more weight as a precedent than a decision of the District Court or Court of Appeals. This is possible because the tax court specializes in tax disputes and its jurisdiction extends throughout the

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[8] Ibid. at § 7422.

United States. Opinions of District Courts and Courts of Appeals are controlling only in their respective jurisdictions. Although a tax court case may be reversed on appeal by one of the Courts of Appeals, its holding may still retain efficacy in jurisdictions where the particular issue has not been appealed.

The government is represented by the regional office of the Chief Counsel of the Internal Revenue Service in conjunction with the appellate division when the case is docketed in the Tax Court. An attorney in the regional counsel's office, to whom the case is assigned for trial, attends settlement conferences. It is the concurrent responsibility of the appellate division and the regional counsel to settle cases after they have been docketed in the Tax Court. If they are unable to agree upon the basis of settlement, the conflict will be resolved by the Chief Counsel. This is a change in settlement procedure which became effective May 1, 1958.[9] Formerly such conflicts, which were few, were resolved jointly by the Commissioner of Internal Revenue and the Chief Counsel. Also, under the new procedure, sole settlement authority is in the regional counsel after the opening session of court. This change is expected to facilitate the settlement of cases inasmuch as the trial attorney is often in a better position to evaluate the evidence.

In order to create a firm foundation for settlement, the taxpayer's attorney must convince the technical advisor and the appellate counsel. during settlement negotiations, that he has competent evidence and will be able to present it well in court. He should be careful not to create the impression that he does not like to try cases or that he will always settle before going to court. Many good settlements have been obtained as late as the eve of the trial. When the tax controversy is settled before hearing, the Tax Court will enter its order based upon the settlement.

If the lawyer does not do his part ably at the administrative stage, there is no assurance that he will have a chance to retrieve his error in court. Tax litigation is expensive. The most important service, therefore, that the lawyer can render to his client in a tax case is to bring the controversy to a successful, early conclusion without the risks and cost of trial.

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[9] Comm. Del. Order No. 60 (Chief Counsel's Order 1958-5), issued April 17, 1958.

State Bar Section

THE LAWYERS AND THE COURTS†

*W. N. Ethridge, Jr.**

The Court and the Bar are old and indispensable friends. I say this first in a personal way. Some of us were classmates in the Ole Miss Law School in the mid-1930's. The mutual search for truth by teacher and student creates a warm friendship. Some of us started that adventure in the Law School too many years ago. And I have known all of you in and out of Court on many occasions, pleasant to me and I hope to you. So I am grateful for your hospitality and for the high professional standards of the Bars which you represent.

The law is made by the Bar even more than by the Bench. The learning, high sense of honor, and varied gifts of the many outstanding lawyers in Mississippi history have given the Bar of this State a reputation throughout the whole domain of the common law. Of course, the World has had its fling at lawyers and at the Courts. It never pays in an appellate argument to attack the trial judge whose opinion is being reviewed, but I heard one attorney start his argument by saying, "This is an appeal from a judgment by Judge A, but there are numerous other good reasons for reversal." Sometimes the judge may abruptly indicate conclusions which tempt a lawyer to reply as one did in my own County of Lafayette. He had barely stated his contentions when the judge said: "There is nothing to your proposition—just nothing to it." The lawyer drew himself up and said: "Your Honor, I have worked on this case for six weeks and you have not heard of it twenty minutes. Now, Judge, you are a lot smarter man than I am, but there is not that much difference between us."

The officers of your District Conference of Local Bar Associations assigned me the topic of the role of the lawyer in society and particularly in the Courts. Now you all know the cautious lawyer who draws his pleadings in such a way that when he comes to trial he will have freedom of action with no issues closed — like the man who denied that his client was the father of said twins or either of them. I wanted to keep for myself full freedom of action, and the suggested subject permits me to say anything without being called to order for irrelevance.

The role of the lawyer in the Courts and the interdependence of the Bar and the Courts are so manifest on the surface that one could be accused of temerity in attempting an analysis of the obvious, but life and the complex relations in it are in fact never obvious and easy. It is like an iceberg with a small visible peak above the rolling seas, but the massive, meaningful and sometimes dangerous structure below the waves. The search for truth and for justice, one of the great pursuits of man on this earth, is the joint task of lawyers and Courts. I want to spend the time alloted to me in discussing with you, first, the meaning and functions of the profession of law in the administration of justice through the Courts. And secondly, looking beneath the surface of contemporary problems in the administration of justice are questions and dangers which members of our profession should recognize and consider. I can offer few, if any, solutions, but I would like to think with you about some of these issues which we must identify and face. No problem in life is insoluble to men of good will, who approach it intelligently, knowledgeably, and with faith in God.

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†An address delivered to the District Conference of Local Bar Associations in Clarksdale, Mississippi, on the night of October 9, 1958.

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I

"Under a government of laws the lives, the fortunes, and the freedom of the people are wholly dependent upon the enforcement of their constitutional rights by an independent judiciary and by an independent bar. The legal profession is a public service."[1] Lawyers are public servants and officers of the Courts. They are the stewards of the legal rights and obligations of all citizens.

According to Dean Roscoe Pound, "a bar association is an association of persons practicing the profession of law formed and maintained to promote the administration of justice according to law and to promote and uphold the purposes and spirit of that profession."[2] What do we mean by a profession? What are its purposes and spirit? Economic necessity requires us to gain a livelihood and to direct our activities in that direction. In all walks of life, man must bear this in mind, and in business and trade it is the primary purpose. However, it is an incidental purpose in a profession. A profession such as the ministry, law, medicine, and teaching means much more than a calling which has a certain traditional dignity. The term "refers to a group of men pursuing a learned art, as a common calling in the spirit of public service." There are three items involved in a profession: Organization, learning, that is, pursuit of a learned art, and a spirit of public service. The idea of gaining a livelihood is involved in all callings, but, as distinguished from trade, in a profession it is incidental. Learning is one thing which distinguishes a profession from a calling or vocation, or occupation. This pertains not only to the nature of the art, but professions "historically have a cultural, an ideal, side which features the exercise of that art." The essence of a profession is that it is practiced in a spirit of public service. A trade aims primarily at personal gain, a profession at service to the public. This spirit of public service is a prerequisite of a sound administration of justice according to law. The other two elements of a profession, organization and pursuit of a learned art, secure and maintain that spirit.

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[1] Pound, The Lawyer from Antiquity to Modern Times (1953), p. vii.
[2] Pound, ibid., p. 4.

The late Chief Justice Arthur T. Vanderbilt of New Jersey once classified "the five functions of the lawyer."[3] All of them relate to and affect the Courts.

(1) The lawyer is a "wise counselor to all manner of men in the varied crises of their lives when they most need disinterested advice." This requires a thorough knowledge of legal principles and how they operate, a wide knowledge of human nature and of modern society, and an ability to forecast the trends of the law. The courts must rely upon counsel advising their clients adequately and carefully. Failure to do so is reflected in the evidence and issues presented to the court.

(2) The great lawyer is also "a skilled advocate trained in the art of prosecuting and defending the local rights of men both in the trial courts and on appeal." Experience as an advocate is necessary in order for the lawyer to evaluate his client's cause as it may develop in the courtroom. Advocacy involves several distinct arts which must be studied and mastered. Of course, here it is that the lawyer's most direct connection with the courts exists. As an officer of the court, the lawyer must present his client's position thoroughly and effectively. The courts could not operate efficiently without that essential contribution.

As Mr. Justice Jackson noted, the lawyer throughout the history of this nation has been an essential American institution. He understands the structure of society, and how its groups relate to each other, because he lives in a community in which he can keep it all in view. He resolves problems by first principles. He takes his obligations seriously and fights his case for a client with all available resources. In that tradition, if he lost in the trial court, he appealed. If he lost there, "he joined the client at the tavern in damning the judge — which is the last rite in closing an unsuccessful case, and I have officiated at many. But he loved his profession, and had a real sense of dedication to the administration of justice, he held his head high as a lawyer, he rendered and exacted courtesy, honor and straightforwardness at the Bar."[4]

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[3] Vanderbilt, The Five Functions of the Lawyer, 40 ABAJ 31 (1954); reprinted in the Lawyer's Treasury, edited by Eugene C. Gerhart (Anthology from ABAJ, 1956), p. 211.

[4] Jackson, The County-Seat Lawyer, 36 ABAJ 497 (1950); reprinted in the Lawyer's Treasury, supra p. 50, 52.

(3) Another task of the lawyer "is to do his part individually and as a member of the organized Bar to improve his profession, the courts, and the law." President Theodore Roosevelt said, "Every man owes some of his time to the upbuilding of the profession to which he belongs." Here again the lawyer is closely related to the courts, because without an active and forward-looking organized Bar, the courts would wither on the vine.

(4) The lawyer must also act as an "intelligent, unselfish leader of public opinion within his own particular sphere of influence." The lawyer is not only a practical man but a thinking man. He has a duty to use that God-given power and training as a leader of public opinion. In this respect the lawyer's function with reference to the courts is less obvious but it exists. He should use his influence as a leader of public opinion to see that the law and the courts retain our traditional principles but also keep pace with the times, and to insure that the Courts are staffed by competent and honorable men.

(5) The lawyer "must be prepared, not necessarily to seek public office, but to answer the call for public service when it comes." Much of the membership of the Constitutional Convention, and of the legislature and other government officers throughout our history have been lawyers. The unselfish holding of public office has always been one of the finest traditions of the legal profession. It affects directly the administration of justice and personnel of the Courts.

All five of these functions of the lawyer — counseling, advocacy, improving his profession, the courts and the law, leadership in molding public opinion, and the unselfish holding of public office — are closely connected with the Courts in many respects. The Bar and the Bench mutually support and rely upon one another. The absence or inadequacy of one might mean the failure of the other.

The lawyer has a double duty to his client and the law. He must do his best for the one, but not at the expense of the other. He must have intellectual ability. He must have integrity, and not just economic integrity, but that of the intellect. Do not shirk awkward facts because they raise difficult problems. You should recognize that there is some weakness in your case and squarely and candidly meet it. I used to say, when I was in the practice, that I made three arguments of every case. First came the one that I had planned — as I thought, logical, coherent, complete. Second was the one actually presented — interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.

II.

It is an exciting time to be alive. The danger to human flesh has never been greater than today. But about no earlier period in history could it be said that the earth could be made sufficient for all of its people. The expanding economy of our beloved nation and the opportunities it offers, material, cultural and spiritual, to develop our land for the best interest of all the people, forecast a bright future. But we must be willing now to accept the claim upon us for the generations to come.

Problems and dangers journey along with opportunities and challenges. This is true of the legal profession, including both the Bar and the Bench. They are the stewards of the legal rights and obligations of citizens. Some of these problems and issues can be identified.

One threat to the idea of a profession is in the "increasing bigness of things in which individual responsibility as a member of the legal profession is diminished or even lost."[5] Economic pressure can make the money-making aspect of the calling the primary or even the sole interest. We must make every effort to remember the great traditions in our custody, and to imbue the younger members of the Bar, and law students, with the idea that the law is a profession characterized by learning and a spirit of public service.

The past twenty-five years have seen the rise in this country of the welfare or service state, which tends to take over services rendered by the professions and replace it by service performed by administrative agencies or bureaus. The efficient administration of our complicated federal and state governments makes necessary the use of administrative agencies, but the Bar should see to it that the individual citizen does not become a mere social security number. When his rights are to be affected by an administrative decision, he should have the right to be represented by a lawyer and to have a full and fair hearing prior to decision. Administrative law may supplement but should not supersede the judicial function in determining the rights of citizens. In my opinion, there is a real need in Mississippi for the Bar to make a critical analysis of the work of administrative agencies, and to support the enactment, based upon such a study, of a uniform administrative procedure act.

Many callings other than the traditional professions are endeavoring to become professions, although they do not profess a learned art and are primarily money-making in purpose and spirit. The desire to elevate the standards of business and of all callings is praiseworthy, but, in elevating these, we should be vigilant to see that the purpose is not achieved by pulling down the standards of the legal and other established professions. I do not think that within our lifetime lawyers will face the same danger of state supervision and control with which the medical profession is threatened in the field of socialized medicine. However, England now has an optional system of socialized legal service, as well as socialized medicine. Of course, effective service to the public by a profession cannot be had by state organized and supervised activities. We must be sure that our profession is maintaining its high standards of conduct and service, in order to preclude even the beginnings of what has happened in England with reference to medicial and legal service.

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[5] Pound, op. cit. supra note 1, p. 354.

Our profession is not sufficiently vigilant and active in developing a program to improve the administration of justice in the courts. Procrastination is one of the main obstacles. If we are not careful we will get ourselves into the position of the Baptist preacher who had used a lot of big words in his sermon and displayed a special fondness for "procrastination", a word which he rolled off his tongue often, and almost as often in an inappropriate place. A learned member of the congregation, suspecting the parson didn't know what he was saying, pressed the latter after the service for a definition of "procrastination." The preacher had to admit he could not give an immediate, accurate definition, but firmly declared it to be "one of the fundamental doctrines of the Baptist church."

My assigned time does not permit, and you would not be receptive to, any detailed discussion of the need to modernize some of our judicial functions. But certainly it can be said that the Bar and the Bench in the state should carefully consider and adopt an active program directed toward creating a judicial council, which would serve continually as an independent critical agency of our court system and would make recommendations and suggestions for its improvement. Among other problems which such a body could consider, along with the Bar, would be (1) the need for a continuing, current statistical survey of the work of all of the courts in the state; (2) the improvement of our jury system; (3) the improvement of our justice of the peace courts, or the substitution for them of a county court system; (4) the revision of our divorce laws, with the objective of reducing the rate of divorce and of enabling the courts to consider more carefully the individual marriage problems of each couple, with the purpose of enabling the marriage to continue; (5) a revision of our rules of practice and procedure in all of the courts, particularly with a view to making them more uniform and modern, including procedures for pre-trial discovery and pre-trial conferences; and (6) the improvement of the administration of criminal justice in the state, with particular reference to modernizing those procedures, improved crime detection, juvenile delinquency, and traffic laws and administration.

The remedies in these respects are relatively simple, and have been clearly demonstrated by experience in other states. They are important to all of us if our kind of government is to function as it should.

Mr. Justice Holmes once said: "Historical continuity is not a duty, it is a necessity." The great ideal of western civilization, which stemmed from the Greek philosophers, was of moderation in all aspects of life and behavior. The Golden Mean, moderation, is assuredly a guide for life in a democracy. Yet the major domestic crisis of our time, affecting the balance of powers between the federal and state governments, has arisen because of the lack of historical continuity and moderation in recent federal court decisions. The American Constitution not only distributes the power of government, but seeks to lay down general principles to insure the just exercise of those powers. This is an important contribution of our nation to political science. The federal-state relationship has always been complex and difficult. Recent decisions impinge upon the spirit of local self-government, which has been a vital force in shaping our democracy from its inception. The recent Report of the Committee on Federal-State Relationships As Affected by Judicial Decisions, approved in August, 1958, by the Conference of Chief Justices, with a substantial majority of the chief justices from states all over the nation voting for it, reflects a growing concern among the Bench and Bar over the danger of abrogation by the federal courts of the essential nature of our federal system.

This problem transcends the important school segregation cases, and extends into many fields, such as the use of the general welfare clause, grants-in-aid, the doctrine of pre-emption, labor relation cases, state law in diversity cases, taxation, state legislative investigations, admissions to the bar, and state administration of criminal law. Certainly the overall tendency of federal decisions over the last twenty-five years or more has been to press the extension of federal power and to press it rapidly. The court has too often adopted the role of policy-maker without judicial self-restraint. Certainly no more important obligation rests upon it than that of careful moderation in the exercise of its powers. The lack of moderation and a sense of historical continuity has resulted in the present domestic crisis.

Judge Learned Hand commented many years ago that "a society so riven that the spirit of moderation is gone, no court *can* save; that a society where the spirit flourishes, no court *need* save . . . What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side . . . . If you ask me how such a temper and such a faith are bred and fostered, I cannot answer . . . . Men must take that temper and that faith with them into the field, into the market place,

. . . they cannot be imposed; they must be lived. Words will not express them; arguments will not clarify them; decisions will not maintain them."[6]

Assuredly, it is unfortunate when a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seemed to him to be first principles are believed by half his fellowmen to be wrong. For myself, it would be "irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[7]

This vital problem of federal-state relationships represents the major domestic crisis of this century. We as lawyers and judges should maintain our sense of balance and use our training and experience in preserving the traditional distribution of powers in the republic.

The problems and issues which I have touched upon present a challenge to the Bar and the Bench. Let us all work toward dealing constructively and effectively with them.

I conclude with Daniel Webster's toast: "The Law: It has Honored Us, May we Honor It."

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[6] Hand, The Contribution of an Independent Judiciary to Civilization, an address delivered in 1942 and printed in Jurisprudence in Action, A Pleader's Anthology (1953), p. 223, 234-235.

[7] Hand, The Bill of Rights (1918), p. 73.

THE POWER OF THE SUPREME COURT OF THE UNITED STATES†

*Charles C. Evans**

There comes a time in the sequence of events in every government when questions arise which vitally effect the stability or the successful functioning of that government. The question of the Federal Judiciary and its powers is, at present, confronting the people of the United States. The power of the Supreme Court to declare acts of Congress unconstitutional by a five or four vote of the Supreme Judges is indeed one of the most pressing questions before the people at this time. It is a question of grave importance to our people, and one which should be considered from every viewpoint before arriving at a definite decision.

It cannot be denied by those who are interested in governmental affairs that some of our people are of the opinion that we are being ruled by a Judicial Oligarchy rather than by the will of the people, expressed through their duly elected representatives. There are some who contend that the Supreme Court with its power should be maintained inviolate as it now functions. There are others who maintain the idea that the power to declare acts of Congress unconstitutional should be exercised only by a seven to two vote of the Judiciary. There are still others, with whom I agree, who contend that the sovereignty of the people should be preserved by recalling this power, which has not been granted to the judiciary by the Constitution.

The Supreme Court of the United States was provided for by the fifty-five men who met on the second Monday in May, 1787, at Philadelphia for the purpose of revising the Articles of Confederation. This meeting was in response to a call from a previous convention of delegates from five of the states, called at the instance of the Legislature of Virginia to take into consideration the subject of uniform trade regulations among the states, the lack of which had come to be one of the chief evils of the Confederation. Although fifty-five members sat in this second convention, only thirty-nine signed the Constitution.

It was in this convention that our present Constitution, without the amendments, was drawn up, and later ratified by all of the states in spite of the powerful oppostion of Patrick Henry, Mason, Lee, and others. During the Confederation, the national government was dependant for the most part on the states for the enforcement of its will.

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†This was a student paper written in 1923 for submission to Judge T. C. Kimbrough, then Dean of the University of Mississippi Law School.

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The Articles of Confederation had made no provision for a federal judiciary.

The purpose of the federal judiciary was to give *force* to the orders of Congress in case of disobedience by either individuals or states. Notice that the original purpose of the judiciary was to give *force* to the acts of Congress, not to *defea*t them. The jurisdiction of the Federal Court was restricted to questions of national interest and to those involving the peace and tranquility of the Union, such as disputes between the states themselves and between the citizens of different states. The jurisdiction of all other controversies was left to the determination of the courts of the several states. The Constitution provides directly only for the Supreme Court and indirectly for the inferior courts, leaving the number of the Judges to be determined by Congress.

The Supreme Court was originally organized by Congress in the Judicial Act of 1789, and was composed of six Judges. Under its present organization the Court is composed of nine Judges, one of whom is chief. These are appointed by the President, subject to confirmation by the Senate, and hold office for life or during good behavior. Their powers are chiefly appellate and they are seldom called upon to exercise the original powers. The most of their attention is occupied with questions of constitutional law and passing upon the validity of legislative acts, either of Congress or of the state legislatures.

Of the various powers exercised by the federal judiciary, one stands out with striking clearness as preeminent. This is the power of the Supreme Court to declare acts of both the state legislatures and of Congress unconstitutional. The tremendous significance of this power is manifest. It gives to the Supreme Court of the United States a position that is unique among the judicial tribunals of the world. In none of the other countries of Europe, not even in Bolshevistic Russia, is there a court with the authority to set aside an act of the legislature on the ground that it is not in harmony with the constitution. It is true, some of the newer states in other parts of the world have adopted this American practice to a greater or lesser degree. No other feature of the government of the United States has excited such deep interest among students of government. It is universally admitted to be of profound importance.

Having given a brief history of the formation of the Supreme Court, we now come to the most important phase of our subject; namely, where did the Supreme Court get the authority to exercise this power? It is a fact of great interest that the Constitution does not confer upon the Supreme Court the power to declare an act of Congress unconstitutional. There is in the Constitution no reference whatever to the constitutionality of laws. When it was proposed, in the

Constitutional Convention, to give the Federal Supreme Court even a limited veto upon acts of Congress, the convention *not once, but four times,* refused to confer this power. (Madison's Journal as printed in Elliot's Debates, Vol. 5, p. 428.)

According to Allen L. Benson in "The Usurped Power of the Courts," p. 5, the man who really made the Constitution, in the sense that his brain supplied all of the distinctive features that differentiated it from all other federal constitutions, was Pelatiah Webster. He was a relative of Daniel and Noah Webster, a graduate of Yale, a financier and economist; yet for a hundred years he was almost forgotten. Hannis Taylor, diplomat and historian, brought to light the real facts concerning Webster in his works on the origin and growth of the English and American constitutions.

On February 16, 1783, Pelatiah Webster published in Philadelphia a pamphlet entitled, "A Dissertation on the Political Union and Constitution of the United States which is necessary to their Preservation and Happiness." In this pamphlet, an original copy of which is in the Library of Congress in Washington, Webster urged the necessity of calling a convention to draft a new constitution and outlined, at length, the kind of constitution he favored. It is interesting to note that even though he outlined a new constitution at least four years before the assembling of the convention, Webster was not a member of that body. However, his fundamental, revolutionary ideas of a federal government were placed before the convention in each of three of the plans presented to that body. They were in the plans of which Madison, Pinckney, and Hamilton were regarded as the authors. They are in the present Constitution of the United States.

Hannis Taylor enumerates them in "The Origin and Growth of the American Constitution," p. 172, as follows:

> "A federal government with independent powers of taxation.
> The division of the federal head into three departments—the legislative, executive and judicial.
>
> The division of the federal legislature into two branches.
>
> A federal government with delegated powers operating directly upon the citizens, the residuum of power remaining in the states."

Webster, in his draft of a constitution, did not say much about the courts. He advocated the establishment of a federal judiciary, but did not suggest that it should have power to invalidate acts of Congress. However, we may infer his meaning by quoting from his famous pamphlet of 1783:

> "Laws or ordinances of any kind (especially of august bodies of

> high dignity and consequence) which fail of execution, are much worse than none; they weaken the government and expose it to contempt . . . . I propose that any state may petition Congress to repeal any law or any decision they have made, and if more than half of the states do this, the law or decision should be repealed, let its nature or importance be however great, excepting only such acts as create funds for the public credit . . . . If every act of Congress is subject to this repeal, Congress itself will have stronger inducement, not only to examine well the several acts under their consideration, but also to communicate the reasons for them to the states, than they would have if their simple votes gave the final stamp of irrevocable authority to their acts."

Briefly reviewing the attempts of the convention to embody in the constitution a clause which would grant the judiciary the power to nullify acts of Congress, we will only consider the plans of Alexander Hamilton and James Madison as they are pertinent to the issue.

In his plan Hamilton proposed that the President and Senators be elected for life, that the President should appoint the governors of the states; that both the President and the Governors should have an absolute veto over acts of Congress which were unconstitutional. This plan was "praised by everybody, but supported by none." (Yate's Minutes of the Convention, Elliot's Debates, Vol. 1, p. 431.) This expression of his views was too bold; the people would never ratify such a constitution.

Madison was too cautious to go directly to the accomplishment of his purpose. He offered the following resolution to the convention:

> "Every bill which shall have passed the two houses shall before it becomes a law, be severally presented to the President of the United States, and to the Judges of the Supreme Court for the revision of each. If upon such revision, they shall approve of it, they shall respectively signify their approbation by signing it; but if, upon such revision, it shall appear improper to either, or both, to be passed into a law, it shall be returned, with the objection against it, to that house in which it shall have originated, who shall enter the objection at large upon their journal, and proceed to reconsider the bill; but if after such reconsideration, two-thirds of the house, when either the President or a majority of the Judges shall object, or three-fourths where both shall object, shall agree to pass it, it shall, together with the objection, be sent to the other house, by which it shall likewise be considered, and if approved by two-thirds or three-fourths of the other house, as the case may be, it shall become a law." (Madison's Journal as printed in Vol. 5, p. 428, Elliott's Debates.)

Then the struggle over the judiciary began. The vote on Madison's resolution was postponed as a result, on Monday, June 4, of a motion by Elbridge Gerry, who desired to offer a resolution giving the President an absolute veto. The convention voted unanimously against it, and by a vote of 8 to 2, gave the President the limited veto he now exercises.

Madison's plan to give the Supreme Court a limited power was revived two days later by James Wilson (of Pennsylvania), who moved a reconsideration of the vote on the resolution. Again it was defeated, by a vote of 8 to 3. On August 15, Madison again made an attempt to incorporate his plan in the constitution, and it was finally voted down 8 to 3. (Madison's Journal, Vol. 5, p. 428, Elliot's Debates.)

When Gouverneur Morris had completed the writing of the Constitution as adopted by the convention, it was submitted to the members for their signatures. It is significant that out of the fifty-five delegates present only thirty-nine signed the Constitution. The other members of the convention refused to sign the document for one reason or another, but their refusals were neatly covered up by Morris in the phrase he appended to the Constitution:

> "Done in convention by the unanimous consent of the states present."

On September 17, with all of the records under lock and key, the Constitution was sent to the Continental Congress for its approval (Secret proceedings of the Federal Convention, pp. 188-189, published in 1909 as United States Senate Document, No. 729.)

Prior to the Revolution, no colonial Supreme Court ever dared to set aside the act of a legislature. Professor Cooley, in "Constitutional Limitations," Sixth edition, p. 193, declares:

> "The first law ever invalidated in America upon the ground of its constitutionality was the act involved in the case of Trevett vs. Weeden, which was decided in the Superior Court of Judicature of Rhode Island in September, 1786. A few months later the Judges, all of whom were elective, were kicked out of office by the legislature."

By the time that the constitutional convention met in 1787 to frame the present national constitution, the courts of five states were beginning to claim the power to declare acts of the legislature unconstitutional. The Courts of the states that claimed this power did not at first exercise it. The Virginia Court of Appeals, as early as 1782, expressed the opinion that "the court has the power to declare any resolution or act of the legislature, or of either branch of it, unconstitutional and void." But the court kept this conviction in the form of an opinion for several years. In 1787, in *Bayard v. Singleton,* the Supreme Court of North Carolina exercised this power. The people denounced the Court and the Judges as described in Coxe, "Judicial Power and Unconstitutional Legislation," p. 252,:

> "The judges were fiercely denounced as usurpers of power. Spaight, afterward governor, voiced a common notion when he declared that 'the state was subject to three individuals who united in their own persons the legislative and judicial power, which no monarch in England enjoys, and which would be more despotic than the Roman triumvirate and equally insufferable!' "

Professor J. Allen Smith in "The Spirit of American Government," p. 90, says:

> "In eight of thirteen states, the doctrine that the judiciary could refuse to enforce laws regularly enacted by the legislative body had not even been asserted by the courts themselves, much less recognized and accepted by the people generally."

Gouverneur Morris, who claimed to have written the Constitution with his own hand, gave it away when he wrote a letter to Timothy Pickering, under date of December 22, 1814, (Elliot's Debates, Vol. 1, p. 506), in which he said:

> "That instrument [referring to the Constitution] was written by the fingers which write this letter. Having rejected redundant and equivocal terms, I believe it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness that it became necessary to select phrases which, expressing my own notions, would not alarm others . . . ."

Later:

> "You have made a good Constitution," said a friend to Morris after he returned from the Convention. "That," replied Morris, "depends on how it is construed." (Gordy, Political Parties in the United States," Vol. 1, p. 114).

Black's Constitutional Law, third edition, pp. 75-76, says:

> "A Constitution is not to be interpreted on narrow or technical principles, but liberally and on broad general lines, in order that it may accomplish the object of its establishment and carry out the great principles of government . . . . It is a cardinal rule in the interpretation of Constitutions that the instrument be so con-

> strued as to give effect to the intention of the people, who adopted it. This intention is to be sought in the Constitution itself, and the apparent meaning of the words employed is to be taken as expressing it except in cases where that assumption would lead to absurdity, ambiguity or contradiction."

At the February (1800) term of the United States Supreme Court, Mr. Justice Chase, in deciding the case of *Cooper v. Telfair,* said:

> "Although it is alleged that all acts of the legislature in direct opposition to the prohibitions of the Constitution would be void, yet it still remains a question where the power resides to declare it void." 4 Dallas 19.

But the man who was both to claim and to seize this power for the Court was already coming, and, the next year, took his seat at the center of the bench—John Marshall. He became Chief Justice in 1801. His appointment was one of President John Adam's last acts.

As the Chief Justice of the United States Supreme Court, he created, by the rendition of the opinion in *Marbury v. Madison,* the greatest Court that the world has ever seen. A court that had never existed anywhere until Marshall's time, and has never existed anywhere else since his time. A court not chosen by the people, that destroys or re-writes laws enacted by the people. A COURT THAT DERIVES ITS OWN GREAT POWERS FROM LINES THAT THE COURT ITSELF READS INTO THE CONSTITUTION – LINES THAT MEN WHO MADE THE CONSTITUTION REFUSED TO PUT INTO IT. And, though Marshal has been dead about ninety years, his brain and his will go marching on. Moreover, Marshall dead is greater than ever was Marshall living. In his life time, the United States Supreme Court exercised powers over only a few millions of people, all on the fringe of one continent. Now the Court exercises powers over one hundred million human beings, some of whom are in the far corners of the sea.

Yet John Marshall, in his early manhood, scorned or pretended to scorn, the great principles for which he afterwards fought. In those days he did not believe the Supreme Court had the inherent right to destroy acts of Congress. He said the Constitution gave the Court no such power. His own words are:

> "The legislative authority of any country can only be restained by its own municipal constitution; this is a principle that springs from the very nature of society, and the judicial authority can have no right to question the validity of a law unless such jurisdiction is expressly given by the Constitution." *Ware v. Hylton,* 3 Dallas 211.

But when he thus spoke, John Marshall was not a Judge; he was a lawyer appearing in a case before the Supreme Court. He had not felt the tug and pull of the legal maxim, "It is the office of a good judge to enlarge his jurisdiction." When his opportunity came to exercise power, he made the most of it. He was Chief Justice of a Court that, as Jefferson said, was "advancing its noiseless step like a thief over the field of jurisdiction."

In the light of the foregoing facts, gathered from the various authorities, there cannot be any doubt in the mind of one who has made a thorough study of the subject as to the intent of those who framed the Constitution. The Constitution does not specifically grant to the judiciary the power to declare acts of Congress or of the legislatures unconstitutional. And inasmuch as the American people, through their representatives in the Constitutional Convention, had, not once, but many times, refused to grant the judiciary this power, it is hardly probable that they would have done by implication what they had refused to do directly. The Constitution contains a grant of power to the government which it creates; all other powers of government are reserved to the several states and to the people. Therefore, if the power to declare acts of Congress unconstitutional was not given the judiciary by the Constitution, that power which the Courts exercise must be an usurped power.

Justice Harlan, in his dissenting opinion in the Standard Oil case, after criticising the rest of the Court for reading the word "unreasonable" into the Sherman Anti-Trust Law, said:

> "After many years of public service at the national capitol, and after a somewhat close observation of the conduct of public affairs, I am compelled to say that there is abroad in the land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and, in the end, will prove most dangerous to all."

The Opinions rendered in the past few years in the Standard Oil case, the American Tobacco Company case, the Coronada Coal Company case, the Income Tax case, the Child Labor case, and others that might be mentioned, are but striking examples of the contention of a great number of people that the courts are often biased in the rendering of their opinions, by their training and surrounding economic and political influences.

The final report of the Commission on Industrial Relations

(Senate Document, No. 415, p.30, 64th Congress), in its report to Congress in 1915, gave as one of the four main sources of industrial and political unrest, "Denial of justice in the creation, in the adjudication, and the administration of the law." Professor Henry R. Saeger, of Columbia University, testified before the Commission:

> "I don't see how any fair minded person can question but what our judges have shown a decided bias in favor of employers. I would not be inclined to ascribe this so much to a class bias, although I think this is a factor, as to the antecedent training of judges. Under our legal system the principal task of the lawyer is to protect property rights, and the property rights have come to be concentrated more and more into the hands of corporations, so that the successful lawyer of today, in a great majority of cases, is the corporation lawyer. His business is to protect the rights of employers and corporations. It is from the ranks of successful lawyers, for the most part, that our judges are selected, and from that results inevitably a certain angle on the part of a majority of our judges."

Thomas Jefferson, in a letter written to C. H. Hammond, in 1821, in reference to the powers of the judiciary, said:

> "It has long been my opinion that the germs of dissolution of our federal government is in the constitution of our federal judiciary, an irresponsible body (for impeachment is scarcely a scarecrow) working like gravity by day and night, gaining a little to-day and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction."

This is no longer an academic question. Out of it has come the demand for the recall, not only of judges, but of their decisions, as evidenced by Roosevelt's platform upon which he ran for the presidency in 1912. It is idle, in my opinion, to talk about a constitutional amendment which will merely meet the objections that arise in each particular case. We cannot live under a system of government where we are forced to amend the constitution every time we want to pass a progressive law. The remedy must adequately cope with the disease, or there is no use applying it.

I would offer, as a solution of this question, the plan suggested by Senator LaFollette in his speech before the annual convention of the American Federation of Labor at Cincinnati, Ohio, June 14, 1922:

> "I would amend the Constitution so as to provide: 1st, That no inferior Federal Judge shall set aside a law of Congress on the ground that it is unconstitutional. 2nd, That if the Supreme Court

> assumes to decide any law of Congress unconstitutional, or, by interpretation, undertakes to assert a public policy at variance with the statutory declaration of Congress—which alone under our system is authorized to determine the public policies of government—the Congress may by reenacting the law nullify the action of the court."

It seems to me that this is in keeping with the great democratic outburst as expressed in the Declaration of Independence, and the ideals for which the real democrats of this nation have always striven. In fact it voices the sentiment as expressed in the platform of the Democratic Party of 1896, as given by Woodrow Wilson in his History of the People, p. 258:

> "The Democratic platform spoke of the decisions of the Supreme Court against the Income Tax as if it advocated a change in the very character of the Constitution, should power come to the party it represented."

Is it not absurd that nine men, no, five men, none of whom were elected by the people, nor are responsible to the people for their decisions, should exercise such tremendous power? I would not for one moment contend that the courts have always given us bad government as a result of their decisions. No, indeed, they have often given us good government. But the question is, is it democratic? If not, what has become of the immortal phrase:

> "Government derives its powers from the consent of the governed."

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Student Comments

THE BUSINESS SIGN STATUTE – A JUDICIAL ENIGMA

I. Introduction

The scope of this comment will be limited to the operation of the Mississippi Business Sign Statute[1] in factual situations involving conditional sales transactions, and will pose one question: does the word 'creditors' in the statute mean only lien creditors, or does it include general creditors as well? The answer to this question is necessary before any real understanding of the sign statute can be had; but, strangely enough, it is this very point which is clothed in doubt and confusion by the Mississippi cases. The question has never been expressly answered by the Mississippi Supreme Court.

Before proceeding to an analysis of the cases it will be necessary to note briefly the history of the statute.

II. History

The Mississippi Sign Statute first appeared as Section 1300 of the Code of 1880, and has been in effect continuously since that time. The language of the Mississippi statute is so like that of the Virginia Traders Act,[2] which was enacted in 1839 and amended in 1849, that it is apparent that our statute was modeled closely after that of Virginia. West Virginia has a similar statute,[3] as does Maryland,[4] but no other states are so blessed. For our purposes, there will be no need to further discuss the West Virginia and Maryland statutes. The West Virginia statute, in both its language and the construction placed on it, is almost identical with that of Virginia, while the procedure which implements the Maryland statute is so different from that of the other states that no discussion of it is warranted here.

Because the language of the Mississippi Sign Statute will be subjected to a careful scrutiny, it will be stated here in part.

> "If a person shall transact business as a trader or otherwise, with the addition of the words "agent," "factor," "and company," or "& Co.," or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, *and be in all respects treated in favor of his creditors as his property.*" (Emphasis added).

The italicized portions above indicate language which is not contained in the Virginia Traders Act. Another difference between the two statutes is that the Virginia Traders Act requires publication of notice, in addition to the display of a sign.

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[1] Miss. Code Ann. § 273 (1942).
[2] Va. Code Ann. § 55-152 (1950).
[3] W. Va. Code Ann. § 4654 (1955).
[4] Md. Code Ann. Art. 2 §§ 18-22 (1951).

Until 1924 the trend in Virginia seemed to be in the direction of holding that all creditors were given the protection of the Traders Act. But, in that year, in the leading case of *Capitol Motor Corp. v. Lasker,*[5] the Virginia Supreme Court held that the word 'creditors' in the act meant only *lien* creditors; general creditors could not avail themselves of the protection of the statute. This was obviously an attempt to limit the application of a statute which was considered penal in nature.[6] Four years later, in a United States Supreme Court decision construing the Virginia Traders Act,[7] the holding of the *Lasker* case[8] was followed without comment. All decisions in Virginia subsequent to the *Lasker* case have also followed its lead without question.[9] Thus, we see that Virginia, at an early date, gave an unequivocal answer to a question which may still be open in Mississippi.

With the above history in mind, we must now turn our attention to the construction of the Mississippi statute, and examine judicial statements not nearly so clear as those of Virginia.

III. Purposes

Since our own statute was fashioned from the pattern established by Virginia, it would seem logical to assume that the same considerations which caused the Court of that state to limit the operation of their statute to lien creditors would apply with equal force in Mississippi. An additional fact which would tend to persuade to that view is that the word 'creditors' in Mississippi's general recording statute[10] has been held to mean only lien creditors.[11] However, the answer to the question regarding the Mississippi statute is not nearly so simple as these factors would indicate.

In analyzing the operation of the Mississippi Sign Statute we must first proceed to an examination of the purposes for which the statute was enacted, the evils which it was designed to prevent. Probably the best starting point in such an examination is the case of *Paine v. Hall Safe & Lock Co.,*[12] one of the early cases involving the sign statute. Justice Campbell, speaking for the Court, described in detail the purposes of the statute (then Section 1300 of the Code of 1880):

> "Its design is to promote honesty and secure justice, by precluding the assertion of secret claims of ownership against creditors of him who has been permitted to possess property in his business as a trader and appear to be its owner. Prior to the enactment of this section conditional sales of personal property of any whereby the vendor retained the title, although the vendee had possession,

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[5] 138 Va. 360, 123 S.E. 376 (1924).

[6] Finance & Guaranty Co. v. Oppenhimer, 276 U.S. 10 (1928); Midland Inv. Corp. v. May, 104 W. Va. 289, 140 S.E. 5 (1927); Capitol Motor Corp. v. Lasker, 138 Va. 360, 123 S.E. 376 (1924).

[7] Finance & Guaranty Co. v. Oppenhimer, 276 U.S. 10 (1928).

[8] Capitol Motor Corp. v. Lasker, 138 Va. 360, 123 S.E. 376 (1924).

[9] Cases cited note 6 supra.

[10] Miss. Code Ann. § 868 (1942).

[11] Loughbridge & Bogan v. Bowland, 52 Miss. 546 (1876).

[12] 64 Miss. 175, 1 So. 56 (1886).

> were valid, where this separation of title and possession did not continue for three years, without any writing or record. [Citations omitted]. This is still the law, except as altered by the section under consideration. By it a change was made as to the class of persons contemplated by it, and while the former law as to conditional sales with all their incidents remains as it was as to the great body of the people, it was changed by this section as to all who fall under the designation of trader, and they are to be treated as the absolute owner of what they use or acquire in business, so far as its liability to their creditors is concerned. The evil of permitting a separation of title and possession was found to exist and bear its worst fruits among those called by the general designation of 'trader,' and hence the effort to correct it, as far as possible, by the just requirements of true signs, and in the absence of such indicia of ownership, by that springing from the possession, dominion, and control of the property."

This pronouncement of the purposes of the sign statute has been followed in the long line of subsequent cases construing the statute. The usual declaration of later courts has been that the purpose of the statute is to prevent secret liens which cause creditors to rely on the property in the hands of the trader as being his own.[13]

IV. Judicial Requirement of Recordation

Cases where the property possessed by the trader was held under conditional sales contracts, and the sign statute was applied, are myriad.[14] There is no requirement as to recordation of conditional sales contracts in Mississippi. However, in applying the sign statute to conditional sales transactions, the Mississippi Court has established as a well settled point that a distinction does exist between situations where the conditional sales contract was recorded, and those where it was not. The cases hold that where the conditional sales contract is recorded a creditor of the trader may not successfully claim the property, because the recordation of the contract is notice to all creditors, and there can be no secret lien.[15] The creditor who had notice of the lien of the conditional vendor cannot be said to have relied on the appearance of dominion and control over the property which was exercised by the trader.[16] On the other hand, where the conditional sales contract is not recorded, then just such a situation is created which the sign statute was designed to prevent.[17] This is a limitation which has been placed on the operation of the Mississippi Sign Statute by our Court.

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[13] Gumbel v. Koon, 59 Miss. 264 (1881); Floyd v. C. Nelson Mfg. Co., 93 F.2d 857 (5th Cir. 1938); International Harvester Co. v. Gully, 188 Miss. 115, 194 So. 472 (1940); National Cash Register Co. v. Thompson, 210 Miss. 37, 48 So.2d 608 (1940).

[14] Paine v. Hall Safe & Lock Co., 64 Miss. 175, 1 So. 56 (1886); Gayden v. Tufts, 68 Miss. 691, 10 So. 53 (1891); Tufts v. Stone, 70 Miss. 54, 11 So. 792 (1892); Quin v. Mosler Safe Co., 21 So. 303 (1897); FitzGerald v. American Mfg. Co., 114 Miss. 580, 75 So. 440 (1917); In re Hemming, 51 F.2d 850 (S.D. Miss. 1931); Ellzey v. Frederick, 191 Miss. 633, 3 So.2d 849 (1941).

[15] Dodds v. Pratt, 64 Miss. 123, 8 So. 167 (1886); Gayden v. Tufts, 68 Miss. 691, 10 So. 53 (1891); Tufts v. Stone, 70 Miss. 54, 11 So. 792 (1892); FitzGerald v. American Mfg. Co., 114 Miss. 580, 75 So. 440 (1917); Floyd v. C. Nelson Mfg. Co., 93 F.2d 857 (5th Cir. 1938).

[16] Cases cited note 15 supra.

Before proceeding it might be well to outline a factual situation which would squarely present the question under consideration. Suppose that A sells goods to B under a title retention or conditional sales contract, and the contract is never recorded. B does not comply with the sign statute. B's creditors, C and D, do not obtain a judgment, attachment, or other lien. B defaults and A retakes the goods. Then C and D throw B into bankruptcy and a trustee in bankruptcy is appointed. The trustee institutes proceedings against A for the goods, basing his claim on the sign statute. The trustee does not have a lien on the goods because they were not a part of the assets of B at the time the petition in bankruptcy was filed.[18] He cannot exercise the lien of any creditor, because at the time of the default and retaking only *general* creditors held claims against the bankrupt.[19] If the trustee is to prevail against A, then, it must be because the sign statute extends its protection to general creditors. This would be the perfect case in which to settle the problem under consideration, but, unfortunately, it has never been presented to the Mississippi Supreme Court.

We will now turn our attention to some of the cases which seem to indicate strongly that this state is committed to the proposition that the word 'creditors' in the statute includes all creditors.

V. Mississippi Cases

In *Gumbel v. Koon*,[20] the creditor invoking the protection of the statute was a lien creditor. However, the decision in nowise turned upon that point. To the contrary, the language used by the Court would seem clearly to indicate that the same result would have been reached regardless of the character of the trader's creditor. The Court, through Justice Cooper, stated:

> "At an early date in the history of this State it was settled by this court that no exception would be engrafted on the statute . . . . It may be that the effect of the statute will be to produce some results not in the contemplation of the legislature at the time it was enacted, but if we depart from the letter of the law as written, we shall be in danger of letting in more evils than we exclude by construction; besides which, the uncertainty that would surround the subject until by a series of decisions the construction of the various clauses of the statute could be fixed would in itself be a most serious evil . . . . As to the creditors of Buffington, whether they were antecedent or subsequent, whether with or without notice of the fact that he was but an agent of another, whether they did or did not extend credit to him in the business, or on the faith of his apparent ownership of the property, the property under this statute

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[17] Paine v. Hall Safe & Lock Co., 64 Miss. 175, 1 So. 56 (1886); FitzGerald v. American Mfg. Co., 114 Miss. 580, 75 So. 440 (1917); In re Hemming, 51 F.2d 850 (S.D. Miss. 1931); Crump v. Hill, 105 F.2d 124 (5th Cir. 1939).

[18] Bankruptcy Act § 70(c), 11 U.S.C. § 110 (1952).

[19] Bankruptcy Act § 70(e)(1), 11 U.S.C. § 110 (1952).

[20] 59 Miss. 264 (1881).

> was his, and subject to their demands . . . . The main object of the statute was to prevent the assertion of secret claims to property, as against creditors of the person who seems to be the owner of it, evidenced by his dealings with it; and it [the statute] conclusively fixes the ownership to be in the person whose sign is exhibited at the place where the business is conducted, or who, in the absence of any sign, is the manager."

In another case, *Floyd v. C. Nelson Mfg. Co.,*[21] a conditional vendor sued the trustee in bankruptcy to recover certain ice cream cabinets and accessories held by the bankrupt under two title retention contracts. The vendor was held entitled to recover the property as against the general creditors of the bankrupt buyer; however, this result rested not on the character of the creditors, but upon the fact that here the title retention contract *was* recorded. Pointing out that where the contract is recorded there is no secret lien, the Court said: "The purposes of the Mississippi Sign Statute, like that of the Virginia Traders Act, . . . is to defeat secret liens . . . . It should not be tortured into a strained construction to defeat honest transactions entered into in accordance with upright business practices." Here, general creditors were attempting to avail themselves of the statute, and the Court, in denying their claim, based the entire decision on the judicial allowance of recordation, which permits the transaction to escape the operation of the statute. No part of the opinion is based on the fact that these were general creditors rather than lien creditors. However, since the goods were in the vendee's hands at the time of the filing of the petition in bankruptcy, it might be argued with some force that, had the contract *not* been recorded, the trustee would have prevailed not because he represented general creditors but because of his statutory lien.[22] Thus, two alternative bases for reaching the same result would have existed had the contract not been recorded.

In the case of *Howe v. Kerr,*[23] J. J. Kerr borrowed $950 from his mother and, with that amount and the joint note of himself and his mother for $800, he bought a saloon business from Rhodes. Montgomery was taken in as a silent partner. Later, without the consent or knowledge of Montgomery, J. J. Kerr, being unable to pay the debts owed his mother and Rhodes, made a joint sale to them of all supplies and fixtures of the business. Montgomery and several other creditors joined in a bill to set aside the conveyance as fraudulent and to have the property applied to the payment of their debts. The case turned on the construction to be given the sign statute. Justice Cooper, in the opinion of the Court, said:

> "There is no doubt that Kerr was indebted to his mother and Rhodes in sums equal to the full value of the property sold to them. The real contention of appellant is that it was not competent for them [Rhodes and the mother] to accept the partnership assets in payment of their demands against J. J. Kerr individually. But the statute declares that, as to creditors, the property is to be

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[21] 93 F.2d 857 (5th Cir. 1938).
[22] Bankruptcy Act § 70(e)(1), 11 U.S.C. § 110 (1952).
[23] 69 Miss. 311, 13 So. 730 (1891).

> treated as the property of Kerr. They might have subjected it to their demands by proceeding at law to judgment and execution, and what the law would have done it was permissible for the parties to do."

It appears from the opinion that the Court permitted *general* creditors to take advantage of the provisions of the sign statute to defeat the action brought by a silent partner and other creditors to have the conveyance of partnership property declared void and the property subjected to the payment of partnership debts. While the opinion states that Montgomery was a silent partner, and that no sign was displayed showing his interest in the business, it is not stated whether the mother and Rhodes (transferees) actually knew of his interest. If they did not, as we must assume from the facts stated in the case, there is again an alternative basis upon which the result reached could rest. The Mississippi Court has held that each member of a partnership is an agent for all other members,[24] but that a partner is not bound by the acts of his copartner unless the act is within the scope of the partnership business, or was authorized or recognized by the partner.[25] It could be argued that, in the *Howe* case, J. J. Kerr was the agent of Montgomery, and, while the sale was outside the scope of the partnership business, still Montgomery had placed apparent authority in J. J. Kerr, and would be estopped from denying actual authority against a bona fide purchaser for value without notice. Of course, if the mother and Rhodes had known of the partnership of Montgomery they would not have been bona fide purchasers without notice, and the case would stand squarely for the proposition that *all* creditors are protected under the Mississippi Business Sign Statute.

Columbus Buggy Co. v. Turley & Parker,[26] involved an analogous factual situation. The opinion stated as follows:

> "It thus appearing that appellees were creditors of Smitha, under the authority of *Howe v. Kerr*, 69 Miss. 311, they are clearly entitled to be protected by the sale to them by their debtor to the extent of $1700. Section 4234, code of 1892 (§ 1300, code of 1880), protects the rights acquired by appellee under the sale to them from their debtor."

It would thus seem that, in both the *Howe* case[27] and the *Columbus Buggy Co.* case,[28] the Court strongly implied that the protection given creditors by virtue of the sign statute is not limited to those creditors holding a lien, but is extended to general creditors as well. Here the contract provided that the vendee should have possession of the goods, and have the power to resell them. But this power of resale was based on an express provision of the contract making Smitha the agent of the vendor. It is stated that Smitha's creditors (who had no lien) did not know of the existence of the title retention contract. The contract was not recorded and Smitha did not comply with the sign statute. So, again, the same result could have been reached on principles of agency law, avoiding any application of the statute. But, the Court, in citing *Howe v. Kerr* with approval, expressly based the decision on the sign statute. While the Court does not discuss the character of the creditors here, there were none but general creditors. So, if the decision is based on the sign statute, as the Court clearly says it is, then we are forced to the conclusion that the protection of the sign statute was, in this case, extended to general creditors.

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[24] Davis v. Richardson, 45 Miss. 499 (1871); Persons v. Oldfield, 101 Miss. 110, 57 So. 417 (1912).

[25] Goodman v. White, 25 Miss. 163 (1852).

[26] 73 Miss. 529, 19 So. 232 (1895).

[27] See note 23 supra.

[28] See note 26 supra.

In *Gillaspy v. International Harvester Co.*,[29] the Mississippi Supreme Court seems to have reaffirmed the position taken in the *Howe* and the *Columbus Buggy Co.* cases. In this case the Hardware company was engaged in the mercantile business and the appellee sent a power engine to the Hardware company for demonstration purposes. During one of these demonstrations the engine broke down and was left in the street. A few days after the arrival of the engine the Hardware company was declared bankrupt and the trustee in bankruptcy instituted a replevin action for the engine, claiming that it was part of the assets of the bankrupt estate. Permitting the trustee to prevail over the claim of the appellee, Harvester company, Justice Cook stated:

> ". . . As between the parties to this contract, it may be admitted that the harvester company remained the owner of the machine, but it seems clear that by our statute the engine could have been levied upon and sold by the *general* creditors of the hardware company. (Emphasis added). When a trader acquires or uses property in his business, the property so acquired or used, as to creditors, will be treated as the property of the trader, no matter what may be the undisclosed contract of the trader and the party from whom the property is acquired . . . . Persons dealing with traders are not burdened with the necessity of inquiring about the ownership of property offered for sale or used in the trader's business. The law fixes the ownership so far as the legal rights of creditors may be affected thereby."

The above decision permitted a trustee in bankruptcy to avail himself of the benefit of the Mississippi Sign Statute to recover assets of the bankrupt estate on the theory that the general creditors of the bankrupt could have invoked the statute and could have subjected the property held by the bankrupt to the satisfaction of their debts. Again, however, a second ground may exist upon which the result of the case may be justified. It could be argued here that the trustee was allowed to recover under the sign statute, not because he represented general creditors, but because of his statutory lien.[30] If this were so, it seems inconceivable that the Court did not expressly state its reasoning.

In *P. E. Payne Hardware Co. v. International Harvester Co.*,[31] the hardware company handled, as local agents of the harvester company, gasoline engines and agricultural implements. The manager of the hardware company abandoned the business and the harvester company sued out a writ of replevin and levied upon and seized the gasoline engines and implements in the possession of the hardware company. Some time later, after the seizure of the machinery by the harvester company, a receiver of the insolvent hardware company was appointed upon petition of the *general* creditors. The receiver intervened in the replevin suit, claiming the property levied upon and seized as part of the assets of the insolvent hardware company. Holding for the receiver as against the harvester company, Justice Cook summarized the position of the receiver in the following terms:

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[29] 109 Miss. 136, 67 So. 904 (1915).

[30] Bankruptcy Act § 70(e)(1), 11 U.S.C. § 110 (1952).

[31] 110 Miss 783, 70 So. 892 (1916).

> ". . . The receiver claims property because he says it was acquired in the business of the corporation, formed a part of its stock in trade, and in the absence of a sign showing that the goods in question were not the property of the Hardware Company it will be treated as the property of the Hardware Company in favor of its creditors; that he, as receiver, appointed by the chancery court, not only represents the corporation, but its creditors as well, and that by his appointment as receiver he was vested with powers to take into his possession all the assets of the corporation, and was expressly authorized by the court to intervene in this suit, for the purpose of contesting with the plaintiff in replevin the ownership of the property. If, as to creditors, this property belonged to the mercantile corporation doing business in Tylertown, by virtue of our statute (section 4784, Code 1906) [Miss. Code Ann. § 273 (1942)], he, the receiver, is entitled to the possession of same. This position of the receiver seems to be sound in law, as well as in fact.
>
> ". . . Among the numerous decisions of this court construing section 4784 of the Code of 1906, we have not been able to find any case precisely in point; but we are convinced that this case comes within the control of said section of our Code, and that the property in question, in so far as the creditors of the Hardware Company are concerned, will be conclusively held to be the property of the Hardware Company . . . ."

The *Payne* decision clearly indicates that the right of the receiver to repossess the property for the benefit of the insolvent estate was predicated upon such right existing in behalf of the general creditors. However, here too there is another side to the coin. Mississippi follows the general rule that, in the absence of statute, general creditors cannot usually secure the appointment of a receiver.[32] The appointment of a receiver has been said to amount to a legal process, or an equitable execution, and fixes the rights of the general creditors upon the property subject to the receivership.[33] The fact that the receiver has some sort of lien is shown by the fact that the rights of a conditional vendor, whose contract was not recorded, were held inferior to the claims of a receiver appointed at the instance of general creditors, although the vendor's rights would have been superior to those of the individual creditors.[34] So, it could be argued that the decision in the *Payne* case was based on the fact that the receiver had a lien of some kind, thus invoking the sign statute. But, in view of the Court's silence on this point — and the fact that the language indicates that the receiver had the same rights here as the general creditors — this writer does not consider that argument a persuasive one.

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[32] Clark v. Fleming, 130 Miss. 504, 94 So. 458 (1922); 45 Am. Jur., Receivers, § 10.

[33] 75 C.J.S., Receivers, § 134.

VI. CONCLUSION

We have seen in each of the Mississippi cases discussed above that there were two bases which would support the decision reached. In every case one of these bases was that the word 'creditors' in the sign statute means all creditors, both lien and general. In every case the decision, from the language used by the Court, was based firmly on the sign statute. At first glance it may appear that these cases prove nothing, because none of them are square holdings. It is submitted, however, that this reasoning cuts two ways. The existence, in every case, of an alternative device, whereby the Court could have reached the same result without committing itself on the construction to be given the sign statute, lends even more weight to the argument that the word 'creditors' in the statute means all creditors. From the cases, we are forced to the conclusion that the Mississippi Supreme Court considers that the protection of the statute extends to general creditors.

Fred C. DeLong, Jr.

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[34] Hetherington & Sons v. Rudisill, 28 F.2d 713 (4th Cir. 1928).

THE FORFEITURE CLAUSE OF CONDITIONAL SALE CONTRACTS – A CAUSE FOR EQUITABLE INTERVENTION IN MISSISSIPPI?

I. INTRODUCTION

The tremendous increase in credit purchasing that has characterized the period since the termination of World War II has placed the conditional sale contract in a place of prominence among the various forms of credit transactions. A large number of the conditional sale contracts now employed by the conditional seller contain what have been termed forfeiture clauses.[1] The effect of this clause is that, "if the buyer defaults in his payments, and the seller exercises his right to retake, all part payments previously made shall be treated as forfeited, or as rental payments, or as payments for damage and depreciation, or as liquidated damages."[2]

The problem presented by the presence of any forfeiture clause in a contract is created by the conflict between the inviolable rights of the parties to contract as they may choose and the proposition that equity abhors a forfeiture and will grant relief against the same. This conflict is brought into its sharpest focus by the forfeiture clauses found in many conditional sale contracts. Under such contracts, the conditional vendor has an option of remedies that he may pursue upon default by the vendee: he may repossess the property to protect or enforce his security interest, or he may rescind the contract and retain the part payments made thereunder as compensation for the possession and use of the property which was the object of the contract. The results that arise by the selection of the latter alternative by the vendor furnish the subject matter for this paper.

If the amount forfeited under the terms of the contract bears a reasonable relation to the actual rental value of the property for the period of time that it was in the vendee's possession, admittedly no grounds for equitable relief are present as no one would deny the right of the vendor to be reasonably compensated for the use of the property. However, if there is a great disparity between the amount paid under the contract by the vendee and the actual rental value of the property, the question then arises whether or not a court of equity should interpose relief in order to prevent a forfeiture.

It appears that this question has never been squarely decided by the Supreme Court of Mississippi; but some of the dicta used by the Mississippi Court, examined in light of the nature of the conditional sale contract and the title retained thereunder in Mississippi, may give some insight into the possible solution of this problem.

Illustrations of the methods in which other jurisdictions have attacked and solved this seemingly irreconcilable conflict will perhaps afford some enlightenment in reaching a conclusion as to what the Mississippi view should be.

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[1] Bogert, 2A Commentaries on Conditional Sales § 131 (1924).
[2] Ibid.

II. STATUS OF THE LAW IN OTHER JURISDICTIONS

A. Relief Against A Forfeiture Denied

A majority of jurisdictions in which this question has been decided have refused to look beyond the provisions of the contract to find a forfeiture and have enforced "such stipulations as the parties were content to make."[3] The Supreme Court of North Dakota, strictly applying the terms of a forfeiture clause, stated:[4]

> "To hold that by reason of his own default the vendee can recover all his payments would work a revolution of business methods long established, and in the end result in untold hardships to vendors. Notwithstanding the fact that in some instances the vendee may be exposed to hardship by denial of his rights to recover all the payments made, we see no sound reason based on logic or authority warranting us in holding that he may do so."

The Supreme Court of California has even refused to grant relief against a forfeiture claimed under a conditional sale contract notwithstanding a statute authorizing such relief in the absence of "a grossly negligent, willful, or fraudulent breach of duty."[5] The Court justified their position by finding that during the time the vendee had possession of the property he had earned a "considerable amount for work done by him" and that he collected rent from persons to whom he had rented the property, consequently, his default was "willful and grossly negligent."[6]

Numerous instances can be found in which courts, upon default of the vendee, have sanctioned forfeitures of the part payments made under the contract although there was a complete absence of a forfeiture clause in the contract.[7] Where the contract is silent regarding forfeiture provisions, the vendors have been permitted to repossess the property upon default of the purchaser and retain the part payments made thereunder, the courts in such cases finding forfeiture clauses by implication:[8]

> ". . . where the vendee is in default, the payments may be retained without the aid of a forfeiture clause; that an agreement forfeiting payments made by the one party in fault is to be implied."

Williston is of the opinion that little importance should be attached to the presence of a forfeiture clause in the contract for "when not expressed it is generally a fair implication" that the defaulting vendee was to forfeit payments.[9]

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[3] Jones, 3 Chattel Mortgages and Conditional Sales § 1382 (6th ed. 1933).

[4] Pfeiffer v. Norman, 22 N.D. 168, 133 N.W. 97, 100 (1911).

[5] Calif. Civ. Code § 3275 (1872). "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

[6] Bird v. Kenworthy, 277 P.2d 1 (Cal. App. 1954).

[7] Silverthorne v. Simon, 59 Cal. App. 494, 211 Pac. 26 (1922), forfeiture permitted because time was of the essence. ". . . its (time of the essence clause) effect is to entail a forfeiture by sheer force of the contract itself, upon the mere default of the purchaser by his failure to make payments . . ." Mohler v. Guest Piano Co., 186 Iowa 161, 172 N.W. 302 (1919); Peterson v. Chess, 92 Wash. 682, 159 Pac. 894 (1916); Peabody v. New York, N. H. & H. R. Co., 187 Mass. 489, 73 N.E. 649 (1905).

[8] Mohler v. Guest Piano Co., 186 Iowa 161, 172 N.W. 302, 306 (1919).

In *Rayfield v. Van Meter*[10] it was contended by the vendee that in equity he should be permitted to recover the sum paid under the contract, less proper compensation for the use of the property, upon repossession by the vendor after default by the purchaser. The California Court, rejecting this defense, stated:[11]

> "It seems to us that there is little equity, and certainly no sound policy, in allowing the buyer, under such circumstances, to be at pleasure to quit his contract, with no other liability than such as the law would have implied had there been no express contract at all. No case is made for the interposition of equity."

When the doctrine of restoration to the statu quo ante, upon the rescission of the contract, has been urged in some jurisdictions in an effort to escape the results of the forfeiture clause, the courts have not hesitated to declare this doctrine to be inapplicable under such circumstances.[12] It is the view in those jurisdictions following this principle that the repossession by the vendor is not a rescission of the contract, but an acting under the contract, and that therefore "the rule requiring one who rescinds a contract to put the other in statu quo should not apply."[13] A noted textwriter acquiescing in the theory advanced by this line of decisions has stated that "the right given expressly or impliedly to retake possession can certainly not be considered as meaning a right to rescind the transaction by putting the buyer in statu quo . . . ."[14]

However, it is submitted that decisions from those jurisdictions referred to above must be interpreted in light of the alternatives open to the vendor in Mississippi under a contract of conditional sale containing a forfeiture clause — he may either retake possession of the property and subject it to the enforcement or protection of his security interest, or he may *absolutely rescind* the contract; and the distinction between and the results flowing from these alternatives. It is important to note the distinction between a rescission of a conditional sale contract and the repossession of the property to protect or enforce the seller's security interest. Where there is a rescission, the vendor's interest in the repossessed property is that of an absolute owner, and it is a propostion of law that the parties must be restored to the statu quo ante.[15] On the other hand, the vendor's interest in the property, where there has been merely a retaking under the contract, is for security purposes only and such property may be either sold by the vendor with the proceeds applied to the debt, or may be held by him until the delinquent payment has been made by the vendee. In the latter instance the attributes of absolute ownership are absent in the vendor and any conduct by the vendor inconsistent with the security title he retains will render the repossession by him a rescission. Another significant distinction is that in the case of a rescission there can be a forfeiture while in the other situation there cannot.

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[9] 3 Williston, Sales § 579c (rev. ed. 1948).

[10] 120 Cal. 416, 52 Pac. 666 (1898).

[11] 52 Pac. at 667.

[12] Haynes v. Hart, 42 Barb. (N. Y.) 58 (1864); Quinby v. Lowell, 89 Me. 547, 36 Atl. 902 (1897); Schmoller & Mueller Piano Co. v. Smith, 204 Iowa 661, 215 N.W. 628 (1927).

[13] C. W. Raymond Co. v Kahn, 124 Minn. 426, 145 N.W. 164, 166 (1914). "We do not decide that all partial payments made by the buyer are forfeited when the seller recovers the property. We do decide that, if not forfeited, the seller should be credited with whatever is determined to be the value of the buyer's use of the property, and the amount of its depreciation."

[14] Note 9 supra.

[15] Kyser v. Southern Bldg. & Loan Association, 224 Ala. 673, 141 So. 648 (1932); Pryor v. Oak Ridge Development Corp., 97 Fla. 1085, 119 So. 326 (1928); Caddo Oil & Mining Co. v. Producer's Oil Co., 134 La. 701, 64 So. 684 (1914).

There can no longer be any doubt that in Mississippi the mere retaking of the property for the purpose of protecting or enforcing the security interest of the vendor is not tantamount to a rescission of the contract.[16] However, this fact does not preclude the effectuation of a rescission when the vendor chooses to exercise the option under the contract giving him the right to rescind upon the default of the vendee. It is somewhat incongruous to maintain that a rescission has not occurred when the vendor, acting under the express terms of the agreement, has rescinded the contract.

The position most courts have assumed in refusing to alleviate against forfeitures, and instead strictly enforcing the contractual provisions, was very succinctly summarized by Justice Holmes in *W. W. Bierce, Ltd. v. Hutchins,*[17] when he spoke of the contract of conditional sale in the folowing manner:[18]

> "Such sales sometimes are regulated by statute and put more or less on the footing of mortgages. With the development of its effect there has been some reaction against the Benthamite doctrine of absolute freedom of contract. But courts are not legislatures and are not at liberty to invent and apply specified regulations according to their notions of convenience. In the absence of a statute their only duty is to discover the meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose."

B. Relief Against Forfeitures Granted

The problem presented by the presence of forfeiture clauses in conditional sale contracts has been solved by statutory enactments in some jurisdictions.[19] However, where relief against forfeitures, either express or implied, has not been provided for by the legislatures some courts have filled this vacuum, and in numerous instances have granted relief by adopting one of several possible doctrines — "no forfeiture was authorized expressly in the contract, because there has been a rescission of the contract, that equity abhors a forfeiture, or simply that recognition of such an unconscionable advantage in the vendor is contrary to the fundamental principles observed in courts of equity."[20]

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[16] Bankston v. Hill, 134 Miss. 288, 98 So. 689 (1924).

[17] 205 U.S. 340 (1907).

[18] Id. at 347-48.

[19] Mo. Rev. Stat. § 428.110 (1949) provides: "whenever such property is so sold or leased, rented, hired or delivered, it shall be unlawful for the vendor, lessor, renter, hirer or deliverer, or his or their agent or servant, to take possession of said property without tendering or refunding to the purchaser, lessee, renter or hirer thereof, or any party receiving the same, the sum or sums of money so paid, after deducting therefrom a reasonable compensation for the use of such property, which shall in no case exceed twenty-five per cent of the amount so paid, *anything in the contract to the contrary notwithstanding,* and whether such condition be expressed in such contract or not, unless such property has been broken or actually damaged, and then a reasonable compensation for such breakage or damage shall be allowed." As construed by the Missouri Court in Dailey v. Singer Mfg. Co., 88 Mo. 301 (1885), this section is not "applicable to the case of an absolute sale, but applies to sales

The Supreme Court of Florida, in *Malone v. Meres,*[21] recognized that a vendor under a conditional sale contract had an option to retake possession of the property and forfeit all payments made thereunder, or that he might elect to consider the property as security for the payment of the purchase price. The Court in delimiting the rights of the vendor under such an option stated:[22]

> "That feature of contracts for the sale of personal property continuing the title in the vendor until the payment in full of the purchase price, called conditional sale, is an attempt to reserve a vendor's lien, which existed at common law and was continued so long as the vendor retained possession of the property and which was lost upon the delivery of possession of the buyer.
>
> "Such an agreement of sale, when signed by both vendor and purchaser, results in securing to the vendor the option of rescinding the sale and retaking possession of the property, *subject to the power of equity to prevent an unconscionable forfeiture,* or waiving the right of possession and forfeiture treating the instrument as one to secure the payment of money.
>
> "This doctrine is in harmony with the maxim that equity abhors a forfeiture, and is consistent with the power of a court of equity under some circumstances to declare such a contract a mere security and protect the purchaser from unconscionable forfeiture." (Emphasis added).

The theory that a forfeiture clause is implied in conditional sale contracts and that partial payments may be retained by the vendor where the vendee is in default was expressly rejected by the Indiana Court in *Quality Clothes Shop v. Keeney.*[23] In refusing to permit the vendor to keep the part payments made under the contract because no forfeiture was expressly authorized by the instrument the Court stated:[24]

> ". . . but there was no provision that in case of default on appellee's part in the performance of any of the conditions to be performed that prior payments should be forfeited. In the absence of such a stipulation, payments previously made, less all damages sustained by a vendor, may be recovered by the vendee when the vendor has retaken the property upon the vendee's default."

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made on the condition that the title is to remain in the seller until the purchase price is fully paid." The provisions of the Ohio Rev. Code Ann. § 1319.14 (Page's 1953), are of similar effect. See also the Uniform Conditional Sales Act § 25.

[20] Jones, op. cit. supra note 3.

[21] 91 Fla. 709, 109 So. 677 (1926).

[22] 109 So. at 694.

[23] 57 Ind. App. 500, 106 N.E. 541 (1914).

[24] 106 N.E. at 543, 544.

This view has also been expressed by the Idaho Court.[25]

The attitude prevailing in Georgia regarding forfeiture provisions under contracts of conditional sale has been pronounced as follows:[26]

> ". . . and provisions for forfeitures are regarded with disfavor, and construed with strictness when applied to contracts, and the forfeiture relates to a matter admitting of compensation or restoration. Where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made . . . . 'On a sale reserving title till the price is paid, many of the cases hold that partial payments are forfeited on default of the residue; but in courts possessing equity powers the modern tendency is to allow the seller who rescinds a contract for default after receiving a part of the price to retain only so much as will compensate him.' "

The judiciary of North Carolina in referring to forfeitures under a conditional sale contract stated in *Puffer & Sons Mfg. Co. v. Lucas*:[27]

> "To permit the so-called 'lessor' to resume possession of the property, and declare all payments forfeited, when perhaps all but one may have been paid, is contrary to the fundamental principles observed in courts of equity."

A similar pronouncement was made by the Maryland Court in *Lincoln v. Quynn*.[28]

In *J. D. Pittman Tractor Co. v. Bolton*,[29] the conditional vendee had filed a bill in equity praying for relief against a forfeiture for nonpayment of an installment when due. The contract contained the typical forfeiture provisions which provided that the seller "may take possession of said property wherever and whenever found, and, with or without notice or demand, may elect to treat buyer in default, and in such event all of the rights, titles, and equities of the buyer in said property shall immediately cease and determine, and seller shall be released from all obligations to transfer or deliver said property to the buyer, and all sums of money theretofore paid, and all sums then due and unpaid by the buyer to the seller hereunder or under said promissory notes shall remain the property of seller and shall be considered compensation for the use, wear and tear and depreciation of said property, and buyer agrees forthwith to pay to seller all of said payments which are then due and unpaid." The parties had also stipulated that time would be considered of the essence of the contract.

The lower court granted the relief sought by the vendee and the Supreme Court of Alabama, affirming this decision, stated:[30]

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[25] Berlin Machine Works v. Dehlbom Lumber Co., 32 Idaho 566, 186 Pac. 513 (1919).

[26] Hays v. Jordan, 85 Ga. 741, 11 S.E. 833, 835 (1890).

[27] 112 N.C. 377, 17 S.E. 174 (1893).

[28] 68 Md. 299, 11 Atl. 848 (1888). "It was stipulated in the contract of sale that, if Hoover made default in any of the credit payments, Lincoln might reclaim and take possession of the goods, and that all payments which had been made up to that time should be forfeited. A court of equity will not lend its aid to enforce a forfeiture of this kind."

[29] 238 Ala. 300, 191 So. 360 (1939).

[30] 191 So. at 362.

> "Stipulations making time of the essence of the contract, empowering the seller to retake possession for condition broken, all payments theretofore made being treated as rentals for the use of the property, while valid at law, are treated in equity as in the nature of a forfeiture, and not to be so enforced as to work oppression and injustice.
>
> "But equitable relief does not depend upon waiver of the conditions written into the contract, for example, if the buyer should meet every installment on time until the greater part of the debt is paid, and then from inability or neglect fails to pay an installment on time, the seller, taking advantage of the letter of his contract, proceeds to repossess the property as his own, refusing the buyer an opportunity to pay the balance. The seller is using the forfeiture provisions of the contract oppressively. Equity, working out its own remedies, interposes to prevent injustice, provided always the buyer is ready and willing to pay the debt. The primary purpose of the contract is to secure the debt."

It would thus appear from the above quote that relief of the buyer from the harshness of a forfeiture clause in Alabama is predicated upon the ability and willingness of the buyer to pay the delinquent installments. What the results would be if the vendee commenced an action to recover the partial payments in excess of the reasonable rental value of the property, not asking for the return of the property that was repossessed, is left in doubt by this decision.

The general attitude of the courts in those jurisdictions which have recognized that a vendee should be permitted to invoke equitable relief when faced with a forfeiture for which he has contracted and the various theories advanced in justifying such intervention can best be summarized by quoting a text on the subject of contracts of conditional sales.[31]

> "None can gainsay that it is a harsh doctrine that permits a conditional vendor to retake and appropriate the goods after the vendee has paid all but a mite, and to retain the payments already made in addition to the goods themselves, leaving the vendee stripped of all rights and interest whatsoever. Recognizing the unfairness in such a situation, the courts, sometimes with no other authority than the perception of an equitable insight for individual justice commonly allowed to the department of equity, extend aid to the vendee in the form of a recovery of payments made or of a right to redeem. The reasons given for this judicial extrication of the vendee from his dilemma are sometimes hazy and unsatisfactory. Legal rules are strained or ignored, the natural logic of the transaction is stretched, and often the point is carried with nothing for its basis but dogmatic assertion; but sans rule, sans logic, sans everything — the idea has gained considerable currency that the overreached conditional vendee must in some way be protected."

Now that there has been an exposition of the conflict regarding the matter of relief from forfeitures, the writer will attempt to speculate as to which line of decisions the Mississippi Court would follow, and to offer some rationale for the choice the Court may make.

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[31] Jones, op. cit. supra note 3.

III. GROUNDS FOR EXTENDING RELIEF IN MISSISSIPPI

A. Nature of Conditional Sale Contract

Since the conclusion that is ultimately reached in this paper is vitally affected by the Court's outlook concerning the character of the conditional sale contract in Mississippi, any discussion of the probable fate of a forfeiture clause, when and if such question is presented to the Mississippi Court, must necessarily be preceded by an examination of the nature of the conditional sale transaction and the title retained thereunder by the vendor as these have been construed by the Mississippi Court.

It should be noted that in many states a conditional sale contract operates to reserve the absolute title to the property in the vendor until the condition (usually the payment of the purchase money) is fulfilled.[32] This construction is illustrated by the California Court which has held that the title retained by the vendor is not a lien but is rather the reservation of the absolute title, subject to be defeated by the payment of the full purchase price by the vendee.[33] On the other hand, there are a number of jurisdictions which regard the retention of title by the vendor as essentially a security transaction to secure the payment of the purchase price.[34]

However, none of these jurisdictions which have adopted the "security interest" theory seem to go as far in applying, nor are as consistent in upholding, the conditional sale as a security transaction, as the Mississippi Court. The cases are legion in which the Supreme Court of Mississippi has stated that a conditional sale contract reserving title in the vendor until full performance by the vendee is merely a security arrangement, a reserved security title.[35] The character that is ascribed the conditional sale contract is best illustrated by the graphic language of Chief Justice McGehee when he stated:[36]

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[32] Shapiro v. Hoffman's Dairy Co., 105 F. Supp. 867 (E.D. Mich. 1952); Joseph Turk Mfg. Co. v. Singer Steel Co., 111 F. Supp. 485 (N.D. Ohio 1951); Beal v. Universal C. I. T. Credit Corp., 146 Me. 437, 82 A.2d 412 (1951).

[33] Phelps v. Loupias, 97 Cal. App. 350, 217 P.2d 748 (1950).

[34] Gateway Discount Corp. v. Reed, 266 S.W.2d 320 (Ky. 1954); Home Indem. Co. v. Bowers, 194 Tenn. 560, 253 S.W.2d 750 (1952); Tatelbaum v. National Store Fixtures Sales Co., 196 Md. 599, 78 A.2d 228 (1951); J. D. Pittman Tractor Co. v. Bolton, 238 Ala. 300, 191 So. 360 (1939); Minneapolis Securities Corp. v. Silvera, 254 Wis. 129, 35 N.W.2d 322 (1948); Petersime Incubator Co. v. Bunn, 239 S.W.2d 416 (Tex. Civ. App. 1951).

[35] Murdock Acceptance Corp. v. Smith, 222 Miss. 594, 76 So.2d 688 (1955); Dearborn Motor Credit Corp. v. Hinton, 221 Miss. 643, 74 So.2d 739 (1954); Associate Discount Corp. v. D. B. Ruddock, 224 Miss. 533, 81 So.2d 249 (1955); Snipes v. Commercial & Industrial Bank, 225 Miss. 345, 83 So.2d 179 (1955); Ford v. Commercial Securities Co., 223 Miss. 736, 79 So.2d 253 (1955); Fanning v. C. I. T. Corp., 187 Miss. 45, 192 So. 41 (1939); Roberts v. International Harvester Co., 181 Miss. 440, 179 So. 745 (1938); Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938); Federal Credit Co. v. Bolewore, 163 Miss. 830, 142 So. 1 (1932); Bankston v. Hill, 134 Miss. 288, 98 So. 689 (1924); Ross-Meehan Brake Shoe Foundry Co. v. Pascagoula Ice Co., 72 Miss. 608, 18 So. 364 (1895); Tufts v. Stone, 70 Miss. 54, 11 So. 792 (1892); Dederick v. Wolfe, 68 Miss. 500, 9 So. 350 (1891).

[36] Murdock Acceptance Corp. v. Smith, 222 Miss. 594, 605, 76 So.2d 688, 692 (1955).

> "The action of replevin was based on the usual conditional sales contract which this court has repeatedly held to *constitute security for the payment of the indebtedness, even though the contract purports to retain title to the property in question . . . ."* (Emphasis added).

Along with this concept that the contract of conditional sale is merely a security arrangement, the Court has also held on numerous occasions that when the vendor repossesses upon the default of the purchaser he must deal with the property as security, treating it with full regard for the equitable rights of the purchaser.[37] The concern which the Mississippi Court has displayed for the equitable rights of the vendee, and the zealousness with which these rights have been protected from abridgment by the vendor, can be well ascertained from the lucid opinion of Judge Griffith in *Brewer v. Universal Credit Co.*[38]

> "When this court has said, as it has so often said, that a conditional sales contract vendor shall deal with the property as security only and with due regard to the equitable rights of the purchaser, it has meant, and we repeat, that the vendor and his assignee shall, in respect to those rights, deal justly with the purchaser . . . ."

From the foregoing discussion it can be discerned that in Mississippi the contract of conditional sale and the duties of the vendor thereunder have acquired certain distinct characteristics — the contract is merely a security transaction, similar in most respects to a chattel mortgage, and the vendor, upon retaking the property, must act with due regard for the equities of the vendee. These characteristics lay the predicate for the theory that a court of equity in Mississippi would intervene to prevent a forfeiture by the vendee of partial payments made under the contract which are greatly out of proportion to the reasonable rental value of the property upon the rescission of the contract by the vendor. The basis for such an assumption is that if the Court has dedicated itself to the protection of the vendee's equities when there has been a repossession by the vendor merely to protect or enforce his security interest, then, a fortiori, such equities should be protected when the vendor has rescinded the contract and is claiming both the property and the partial payments under the guise of rent. There seems to be no logical reason why the equitable rights of the defaulting vendee in the property should be the object of the Court's protective shield in the one instance and not in the other. Nor does the fact that the vendee contracted for such forfeiture furnish any reasons; for if a court of equity were never permitted to look beyond the provisions of the contract but were instead strictly and unequivocally bound by the written instrument, interpreted in a vacuum with absolute disregard for any extenuating circumstances, then it is rather difficult to conceive of any situation in which equity could intervene to prevent a forfeiture.

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[37] Brewer v. Universal Credit Co., 191 Miss. 183, 192 So. 902 (1940); Roberts v. International Harvester Co., 181 Miss. 440, 179 So. 745 (1938); Dearborn Motors Credit Corp v. Hinton, 221 Miss. 643, 74 So.2d 739 (1954).

[38] 191 Miss. 183, 192 So. 902 (1940).

"Equity, working out its own remedies, interposes to prevent injustice . . . ."[39]

B. Case Authority

As has been previously pointed out, there seems to be no case in this jurisdiction in which the question of relief against forfeitures under conditional sale contracts has been directly presented to the Mississippi Supreme Court. However, the Mississippi Reports are not completely silent in regard to this matter. In several instances the Court has alluded to the problem and by way of dicta has revealed the position it may assume when confronted with inequities precipitated by the forfeiture provision.

The first indication by the Mississippi Court that a defaulting vendee may find relief in a court of equity against the forfeiture demanded by the vendor can be found in the case of *Duke v. Shackleford.*[40] In this case Shackleford sold to Mary Dellahite some machinery for which he received $550 cash and Mary's note for $225. Title to the property was reserved by Shackleford until payment of the note. The note was not paid at maturity, and Shackleford brought an action of replevin against Duke who had purchased the property from Mary. The Court, in permitting the vendor to replevy the property without first returning the payment already made, pointed out that this was an action at law and stated regarding the vendee's equitable remedies:

> "What rights, if any, the vendee in such a contract might have in a court of chancery is not before us."

Citing the *Duke* case as authority, Bogert has commented:[41]

> "In some decisions it is suggested that, although the buyer has no legal right to the return of his part payments, he may have rights in equity."

In *Tufts v. Stone,*[42] the parties had entered into a conditional sale contract whereby the conditional vendee would have possession of a soda fountain, while title was retained by the conditional vendor to secure the purchase price. The consideration of the contract was $800, evidenced by thirty-two promissory notes for $25 each, payable monthly. Later, the conditional vendee moved to another county and took the soda fountain with him. He commenced business in this county, using the fountain in his business, under the name of "Martz Bros." The conditional sale contract had been recorded in both counties where the vendee had transacted business. "Martz Bros." made a general assignment for the benefit of creditors, and the soda fountain was turned over to the assignee, Stone. The conditional vendor instituted a replevin action. The Court held that the Business Sign Statute did not apply because the contract had been recorded, and, by the way of dictum, stated what the rights of the conditional vendee would be in a court of equity:[43]

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[39] See note 30 supra.

[40] 56 Miss. 552 (1879).

[41] Bogert, 2A Commentaries on Conditional Sales § 130 (1924).

[42] 70 Miss. 54, 11 So. 792 (1892).

> "Martz (the conditional vendee) had such title and interest in the property when this litigation arose as would have been protected in a court of equity. He had paid Tufts (the conditional vendor) about $500 in pursuance of his agreement, and would the latter be permitted, in equity, to retain this $500 and retake absolutely, as his own, the property for which the $500 had been paid? Rather, would not Tufts have been allowed to resort to his security only so far as the same might be necessary to satisfy the balance due from Martz? Suppose Martz had paid thirty-one of the thirty-two notes, and by disaster had been unable to pay the remaining note of $25, *would any court of conscience tolerate an assertion of Tuft's right to hold on to the* $775 *already paid him, and to take as his own the property also?*" (Emphasis added).

Although the report of the *Tufts* case does not indicate the presence of an express forfeiture clause in the contract, it is suggested that the language employed by the Court is a cogent indication of the course the Court would take if the problem treated in this comment were presented.

The case of *Dederick v. Wolfe*[44] involved a contract under which the seller delivered to the defendants certain machinery retaining title in himself, for which he received notes payable one, two, and three years later. There was a stipulation to the effect that the seller might, on default of the buyer in either payment, retake the property and that "any amount that may have been paid . . . shall be considered payment for the use of the machinery . . . ." The purchaser defaulted after payment of two notes, and the seller replevied the machinery. In an action brought to collect the balance of the purchase price, the court held that the repossession *was not* a rescission of the contract and resort to the property was for the purpose of securing the purchase price in pursuance to the contract. In affirming the action of the lower court the Supreme Court stated:[45]

> "In the case before us the seller merely resorted to the thing sold to make it available as a security for the note due and not paid. *He did not claim the right to the press and the money too,* but to make what he could by a sale of the press at public outcry after due notice, and hold the maker of the contract to pay the balance." (Emphasis added).

Upon a close analysis of the language emphasized in the two excerpts above, it is submitted that it does not stretch the rules of interpretation to suggest that in both the *Tufts* case and the *Dederick* case the Court was anticipating an instance in which the conditional vendor claims the absolute title to the repossessed property (not merely a security interest alone) *and* the right to retain the partial payments that had already been made by the vendee. It is important to note that in neither case had there been a rescission of the contract, but merely a repossession by the vendor for the purpose of enforcing his security interest.

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[43] 70 Miss. at 58, 11 So. at 793.
[44] 68 Miss. 500, 9 So. 350 (1891).
[45] 68 Miss. at 505, 9 So. at 351.

It is urged that the *Duke,* the *Tufts,* and the *Dederick* cases not only served as an entree in Mississippi for litigation commenced in equity to prevent forfeitures under a contract of conditional sale, but the *Tufts* case went even further and gave a clear insight as to what the proper results should be when such an issue did arise.

IV. CONCLUSION

Calling attention to the fact that the dangers and inequalities of forfeitures are present in no less degree in conditional sale contracts than they are in mortgages, *Williston* suggests that the dilemma created by the conflict between the right to contract for forfeitures and equity's abhorence of the same can best be resolved by recognizing that the essential characteristic of the conditional sale transaction "is the same as that of an absolute sale with a mortgage back."[46] This would create a situation similar to the mortgagor - mortgagee relationship with its entourage of equitable principles designed to alleviate against forfeitures regardless of the provisions of the mortgage. Since Mississippi has long been an exponent of the view that the conditional sale transaction is nothing more than a security arrangement,[47] it would appear that a firm foundation exists in this jurisdiction for the application of the theory advanced by *Williston.*

The Court's interpretation of the office of the conditional sale contract, and the ancillary duty imposed thereunder upon the vendor to act with due regard for the vendee's equitable rights, coupled with the dicta that are illustrative of the Court's attitude toward forfeitures, lead one to conclude that when the proper factual situation is directly presented to the Mississippi Court an adequate and authoritative basis could and would be found for equitable intervention to prevent an unconscionable forfeiture, notwithstanding the existence of a forfeiture clause.

James F. McKenzie

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[46] 3 Williston, Sales § 579d (Rev. ed. 1948).
[47] See note 35 supra.

STATE JURISDICTION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

I. Introduction

It may be stated at the outset that the principal premise of this comment is that the Federal act under consideration[1] supersedes state laws—constitutional, statutory, or common—which relate to the liability of an interstate carrier by rail for injury to its interstate employees.[2] As readily seen from the Act,[3] the state courts have concurrent jurisdiction with the courts of the United States and any action under the act may be tried in a state court.[4] It has been held[5] that in actions in the state courts under the FELA, the federal law—both statutory and decisional—governs as to the substantive rights, while the *lexi fori* governs as to matters relating to practice and procedure. The theme of this paper, therefore, centers around the question of whether matters arising under such actions are of substance or procedure.

II. Applicability of State Statutes

The first conflict arising in Mississippi concerned the applicability of the state's "prima facie" statute[6] which provides that proof of injury from the running of an engine propelled by steam is prima facie evidence of negligence, and that the defendant must show facts and circumstances surrounding the occurrence to absolve itself of negligence. In 1916, the Mississippi Court, in a per curiam memorandum decision in the case of *New Orleans & N. E. R. Co. v. Harris*,[7] affirmed the Circuit Court of Lauderdale County and applied the prima facie statute in an action under the FELA. This case was folowed in 1917 by two decisions[8] which also approved of the application of the statute—the court stating in the *Scarlet* case that the section "deals not with a substantive right, but only a rule of evidence, and, since the *lex fori* governs in all matters of procedure, the court below committed no error in charging the jury in acordance therewith."

All three of these cases were subsequently appealed to the United States Supreme Court, and, in 1918, that Court reversed the Mississippi Court in the case of *New Orleans & N. E. R. Co. v. Harris*.[9] There it was said that negligence is an essential fact to recovery and must be established by the plaintiff. The question of burden of proof is a matter of substance, and not subject to control by laws of the several states.[10] Reversals in the *Scarlet*[11] and *Mullins*[12] cases followed shortly, and it would seem firmly established that Mississippi's prima facie statute has no place under the Federal Employers' Liability Act.[13] The Mississippi Court acquiesced in this determination in *Yazoo* & *M.V.R. Co. v. McCaskell*[14] and *New Orleans* & *N. E. R. Co. v. Hanna,*[15] where recoveries based on the statute were reversed with the *Harris* case cited as authority.

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[1] Employers' Liability Act, 35 Stat. 65-66 (1908), 45 U.S.C. §§ 51-60 (1952).

[2] Mondou v. New York N. H. & H. R. Co., 223 U.S. 1 (1912); Yazoo & M. V. R. Co. v. Mullins, 249 U.S. 528 (1919). But the act does not have the effect of rendering state statutes refering to carriers generally invalid; it merely limits their application to intrastate business, Boston & M. R. Co. v. Armburg, 285 U.S. 234 (1932).

[3] Employers' Liability Act § 6, 33 Stat. 66 (1908), 45 U.S.C. § 56 (1952), ". . . The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

[4] Where, however, the state statute forbids the prosecution of an action to recover damages on account of death occurring outside the state, the state court has no jurisdiction of an action under the federal statute. Walton v. Pryor, 276 Ill. 563, 115 N.E. 2 (1916), *writ of error dismissed* 245 U.S. 675 (1918).

[5] Illinois Central R. Co. v. Johnston, 205 Ala. 1, 87 So. 866 (1920), *cert. denied* 254 U.S. 654 (1921); Central Vt. Ry. v. White, 238 U.S. 507, 511 (1915).

[6] Miss. Code Ann. § 1741 (1942).

[7] 71 So. 913 (Miss. 1916).

[8] New Orleans & N. E. R. Co. v. Scarlet, 115 Miss. 285, 76 So. 265 (1917); Yazoo & M. V. R. Co. v. Mullins, 115 Miss. 343, 76 So. 147 (1917).

[9] 247 U.S. 367 (1918).

A somewhat similar question arose in the case of *New Orleans* & *N. E. R. Co. v. Jackson*[16] in connection with Mississippi Code of 1942, Section 1697, which provides that all disclosures by patients to physicians are privileged and cannot be disclosed except at the instance of the patient. The facts of the case show that the statute operated to exclude testimony of a physician as to the extent of plaintiff's injuries. In the Supreme Court, the defendant railroad contended that the operation of the statute was substantive in effect[17] and no more applicable than the prima facie statute. The court, however, distinguished the operation of the privileged communications statute, in that the latter statute made it possible for the plaintiff to recover without proving negligence, an essential to recovery under the common law as administered by the federal courts. The privileged communications statute, however, does not affect the substantive rights and obligations of the parties—it is a statute affecting only the competency of certain witnesses. The particular point has never been passed on by the United States Supreme Court, but it would seem to be firmly established in Mississippi jurisprudence.

Section 1464 of our Code[18] has been held applicable, in suits under the FELA, as to the sufficiency of the declaration in stating a cause of action. The statute provides that if a declaration "contains sufficient matter of substance for the court to proceed upon the merits of the case, it shall be sufficient." In *Ross v. Louisville* & *N. R. Co.*[91] the Mississippi Court held that such a question was one of procedure and a proper case for the application of state law. A Minnesota statute which gives the attorney a lien upon the cause of action for his services[20] was held to apply to a cause of action under the FELA.[21] State rules as to the direction of verdicts have been held applicable,[22] as well as state practice regarding judgments notwithstanding the verdict.[23]

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[10] What constitutes negligence making a railroad liable in damages under the FELA is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes, and is governed by federal decisional law. Erie v. Thompson, 337 U.S. 163 (1949); Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957).

[11] 249 U.S. 528 (1919).

[12] 249 U.S. 53 (1919).

[13] Similar statutes were held inapplicable in: St. Louis, I. M. & S. R. Co. v. Steel, 129 Ark. 520, 197 S.W. 288 (1917); Louisville & N. R. Co. v. Rhodes, 74 So. 19 (Fla. 1917); Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 79 S.E. 558 (1913); Palmer v. Wichita Falls & N. W. R. Co., 60 Okla. 205, 159 P. 1115 (1916).

[14] 118 Miss. 629, 79 So. 817 (1918).

[15] 118 Miss. 40, 78 So. 853 (1918).

[16] 145 Miss. 702, 110 So. 586 (1926).

[17] ". . . The Supreme Court of the United States promptly declared that [the prima facie statute] could have no application to cases arising under the Federal Employers' Liability Act, because it affected the substantial rights of the parties . . . . By the same reasoning we submit that our privileged communications statute affects a matter of substance, even though it be classified as a mere rule of evidence." Brief of appellant, New Orleans & N. E. R. Co. v. Jackson, id. at 588.

[18] Miss. Code Ann. § 1464 (1942).

Section one of the Act[24] enumerates the beneficiaries who may recover in the event of the trainman's death and provides for "the next of kin dependent on such employee." However, the statute contains no definition of the persons who constitute the "next of kin." Since the persons who are next of kin are determined by legislation in the various states, it would seem clear that the absence of a definition indicates a purpose to leave the determination of that question to state law.[25]

By Mississippi Code of 1942, Section 622, the executor or administrator of an estate, appointed in a foreign jurisdiction, must file a certified copy of his foreign appointment with the chancery clerk of the county in which he expects to sue, along with ancillary letters of administration. In *Gulf, M.* & *N. R. Co. v. Wood*[26] our Court held that the administratrix of the estate of a deceased railroad employee, who was appointed in Tennessee, did not have to comply with the terms of section 622. The court said that the federal statute controls in every substantive particular, and that this includes the party in whom the cause of action is vested. When the plaintiff shows that he has been legally appointed as the personal representative of the estate by a court having competent jurisdiction, then the person so appointed may sue in Mississippi under the FELA, and ancillary letters or compliance with section 622 is not necessary.

Section four of the Federal Employers' Liability Act[27] provides, in part, that an employee shall not be held to have assumed the risks of his employment where the violation by the carrier of any statute enacted for the safety of employees contributes to the injury. In 1925 a case arose from the death of a railroad employee in the yards at Cleveland, Mississippi.[28] The plaintiff contended that the defendant railroad had violated Mississippi Code of 1942, Section 7770, by kick switching its cars, and, therefore, the defense of assumption of risk was not open to the defendant. The Fifth Circuit Court of Appeals held, however, that Section 4 of the FELA refers only to acts of Congress and not to the acts of state legislatures.[29] It would seem, nevertheless, that viola-

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[19] 178 Miss. 69, 172 So. 75 (1927); in accord, Renn v. Seaboard Air Line R. Co., 170 N. C. 128 (1915).

[20] Gen. Stats. § 4955 (1913).

[21] Dickinson v. Stiles, 246 U.S. 631 (1918).

[22] Dutton v. Atlantic Coast Line R. Co., 104 S.C. 16, 88 S.E. 263 (1916).

[23] Marshall v. Chicago, R. I. & P. R. Co., 133 Minn. 460, 157 N.W. 638 (1916).

[24] Employers' Liability Act § 1, 35 Stat. 65 (1908), 45 U.S.C. § 51 (1942).

[25] Seaboard Air Line R. Co. v. Kenney, 240 U.S. 489 (1916); Taylor v. Taylor, 232 U.S. 363 (1914); Meisenhelder v. Chicago & N. W. R. Co., 170 Minn. 317, 213 N.W. 32 (1927); Poff v. Pennsylvania R. Co., 327 U.S. 399 (1946).

[26] 164 Miss. 765, 146 So. 298 (1930).

[27] Employers' Liability Act § 4, 35 Stat. 66 (1908), 45 U.S.C. § 54 (1942).

[28] Gilmer v. Yazoo & M. V. R. Co., 4 F.2d 963 (5th Cir. 1925), *cert. denied* 268 U.S. 705 (1925).

tion of such a state statute would tend to indicate negligence on the part of the employer.

When injury results from a violation of the Federal Safety Appliance Act or other Congressional legislation for the protection of railroad workers, neither assumption of the risk, nor contributory negligence is available as a defense to the employer.[30] It has been held, in fact, that such defenses are not available even though the contributory negligence on the part of the employee amounts to a criminal offense or a misdemeanor under state laws.[31]

III. APPLICABILITY OF STATE COMMON LAW

Prior to the 1939 amendment to the Act[32] which abolished the defense of assumption of risk, that defense was available to the employer. Different rules as to the defense are applied in the several states, and consequently the question arose as to which was the proper rule to be applied under the FELA. Missouri, in particular, held that the term "assumption of risk" must be construed according to the common law of the various states. Missouri applied its own rule[33] in numerous cases.[34] This controversy was ended, however, by the decision of *Pryor v. Williams*,[35] when the Supreme Court of the United States held that the federal rule[36] would apply in all cases under the FELA. It seems that Mississippi has consistently followed the correct rule because our Court has stated that risks created by the master's negligence are not assumed by the servant unless, with the actual or constructive knowledge thereof, he voluntarily enters or continues in the employment of the master.[37]

Another problem, which confronted some jurisdictions, was upon whom to cast the burden of showing contributory negligence or the absence thereof. In Vermont the plaintiff is saddled with the burden of showing not only that the defendant was negligent but also that he was free of any negligence himself. The Supreme Court of the United States, in *Central Vt. R. Co. v. White*,[38] held that the burden of proof in such instances was a part of the substance of the case, and not a mere

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[29] The Supreme Court gave its approval to this limitation in Seaboard Air Line R. Co. v. Horton, 233 U.S. 492 (1914).

[30] Alabama & M. V. Ry. Co. v. Dennis, 128 Miss. 298, 91 So. 4 (1922).

[31] Spokane & I. E. R. Co. v. Campbell, 241 U.S. 497 (1916).

[32] Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

[33] An employee never assumes the risk of the employer's negligence, even if he has knowledge thereof and appreciates the risk arising therefrom.

[34] Hawkins v. St. Louis & S. F. R. Co., 189 Mo. App. 201, 174 S.W. 129 (1915); Holloway v. Missouri, K. & T. R. Co., 276 Mo. 490, 208 S.W. 27 (1918); Williams v. Pryor, 272 Mo. 613, 200 S.W. 53 (1917).

[35] 254 U.S. 431 (1920).

[36] The federal rule as to assumption of risk is that when an employee knows of a defect and appreciates the risk that is attributable to it, then, if he continues in the employment without objection, or without obtaining from his employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arises from the master's breach of duty. Seaboard Air Line R. Co. v. Horton, 233 U.S. 492 (1914).

[37] Yazoo & M. V. R. Co. v. Dees, 121 Miss. 439, 83 So. 613 (1920); Gulf & S. I. R. Co. v. Hales, 140 Miss. 829, 105 So. 458 (1925).

[38] 238 U.S. 507 (1915); in accord, Crugley v. Grand Trunk R. Co., 79 N.H. 276, 108 Atl. 293 (1919); Holmberg v. Lake Shore & M. S. R. Co., 188 Mich. 605, 155 N.W. 504 (1915).

rule of procedure; therefore, the federal rule was applicable and the burden of showing contributory negligence was cast upon the defendant.[39]

The Mississippi Court was in error when it approved an instruction to the jury that a railroad was under an absolute duty to furnish its employees a safe place in which to work.[40] The Supreme Court of the United States, reversing the Mississippi Court, held that the duty was not absolute, but that the railroad must use only reasonable care.

The basis for the admission of expert opinions is a procedural matter and is therefore subject to the rules laid down for its admission in the several states.[41] The *Clay* case holds that whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves presumed.[42]

In *Gulf & S. I. R. Co. v. Hales*,[43] the jury returned a verdict for the plaintiff after the court refused to direct a verdict for the defendant. On appeal, judgment was reversed and final judgment rendered for the defendant over the plaintiff's objection that the seventh amendment[44] was applicable and prohibited such a re-examination of the facts tried by the jury. The Mississippi Court held that the FELA does not operate to extend the application of the seventh amendment to state courts. The practice in Mississippi, of rendering a final judgment in the Supreme Court for the appellant in a case where the trial court should have directed a verdict for him, is a matter of practice and procedure, and does not abridge the substantive rights of the parties under the FELA.

The question of the proper measure of damages is inseparably connected with the right of action, and it must be settled according to general principles of law as administered by the federal courts, unaffected by state legislation or the decisions of state courts.[45] This doctrine was applied in Mississippi in *Illinois Central R. Co. v. Humphries*.[46] In the first trial of the case, the defendant attempted to show that the deceased assumed the risk of hitting a pile of cinders, since the pile had been there four or five months. Other evidence was introduced to the effect that the pile had been there only a few days. The jury found for the plaintiff. The Supreme Court affirmed the finding as to liability but reversed as to damages.[47] On the subsequent trial, for recomputation of damages, the defendant sought to introduce the same evidence to show that deceased was contributorily negligent. The trial court refused to admit such evidence and for that reason was reversed again. The majority held that the jury finding in the first trial on the evidence of assumption of the risk was not res adjudicata as to the same facts offered to show contributory negligence. The FELA requires that in a second trial for damages all the elements of damages be left as fully opened as on the first trial. Justice Ethridge dissented on the ground that the jury necessarily found in the first trial that the fact averred by the defendant was not true and, therefore, the parties are bound in the subsequent trial to that fact. The United States Supreme Court would seem to be in accord with the majority opinion, for in *Norfolk Southern R. Co. v. Ferebee*[48] they held such a matter to be a substantive right and stated, "Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury."

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[39] Mississippi follows the federal rule and holds that "contributory negligence is an affirmative defense and the burden of proving it is upon the defendant," Johnson v. Howell, 213 Miss. 195, 56 So. 2d 491 (1952); Railway Express Agency v. Mullory, 168 F.2d 426 (5th Cir. 1948), *cert. denied* 335 U.S. 824 (1948).

[40] Yazoo & M. V. R. Co. et al. v. Mullins, Admin., 249 U.S. 53 (1919).

[41] Mobile & O. R. Co. v. Clay, 156 Miss. 463, 125 So. 819, *cert. denied* 282 U.S. 844 (1930).

[42] See note 41 supra.

[43] 140 Miss. 829, 105 So. 458 (1925).

[44] U. S. Const. amend VII.

[45] Chesapeake & O. R. Co. v. Kelly, 241 U.S. 485 (1916); Layhils v. Kansas City So. R. Co., 225 Mo. 459, 205 S. W. 3 (1918).

[46] 174 Miss. 459, 164 So. 22 (1935).

[47] Illinois Central R. R. v. Humphries, 170 Miss. 840, 155 So. 421 (1934).

St. Louis - San Francisco Ry. Co. v. Dyson[49] shows another variance in trial procedure in this state when the FELA is applicable. In the trial court an instruction was given which authorized a recovery "not to exceed the amount of $55,450.00, the amount sued for." The Mississippi Court disapproved of the instruction and warned that such might endanger a verdict in this state, but held that the computation of damages is to be governed by the federal law. The Supreme Court of the United States has held that the words here criticised could only have been understood as setting a limit beyond which the jury could not go, and, so long as the court demands of the jury that there be a proximate and casual relation between the damages and the negligence of the defendant, there is no error in referring to the limit stated in the declaration.[50] Here then is a practice condemned by our Court which is acceptable in a suit under the FELA.

The United States Supreme Court has limited its consideration of writs of error from highest state courts to matters involving the substative rights given under the FELA.[51] Matters of pleading, admissibility of evidence, sufficiency of exceptions, and various rulings of the trial court which involve no construction of the Federal Employers' Liability Act cannot be considered on appeal from the state courts.

IV. CONCLUSION

Whether a particular practice is to be governed by state or federal rules is still open to question. A great amount of litigation has failed to establish any clear-cut formula for determining the applicable rule in all cases. The statement that "all matters which affect substance" are to be governed by the federal act and federal interpretation thereof is unsatisfactory, for that phrase itself must be interpreted. It is clear that substance includes: the party on whom the burden of proving negligence and contributory negligence is placed, the persons in whom he action is vested, the interpretation of the defense of assumption of isk, the defining of what constitutes a safe place in which to work, the pplication of the defense of contributory negligence, and the rules for omputing damages. It does not include: the right to exclude privileged ommunications, the determination of the deceased's heirs, the applicability of state statutory liens on judgments, statutory rules as to the ufficiency of the declaration, the basis for the admission of expert opinions, and rules as to the direction of verdicts in the appellate court. However, the distinction between some of these factors is not clear.

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[48] 238 U. S. 269 (1915).

[49] 207 Miss. 639, 43 So.2d 95 (1949).

[50] Norfolk & Western R. Co. v. Earnest, 229 U.S. 114 (1913).

[51] Central Vt. R. Co. v. White, 238 U.S. 507 (1915); New Orleans & N. E. R. Co. v. Harris, 247 U.S. 367 (1918).

A complete outline of the correct procedure in such cases is yet to be seen, but a workable method can be gleaned from the various decisions on the subject.

Edward E. Laird, Jr.

RECENT DECISIONS

CONSTITUTIONAL LAW — CONSTITUTIONALITY OF EXPATRIATION LAW

Petitioner, a native born American, was taken to Mexico by his parents when about eleven years of age. Though he was informed of his American birth in 1928, at the age of nineteen, petitioner remained in Mexico and was married there. Petitioner admits remaining out of the United States during World War II in order to avoid the draft, though he did enter twice as a wartime alien laborer for short periods of time. Petitioner also admits voting in a Mexican national election. In 1954 petitioner brought suit before a United States District Court seeking a declaratory judgment of his citizenship. Petitioner appeals from a finding that he had expatriated himself by his actions on the grounds that Section 401 (e) and 401 (j) of the Nationality Act of 1940, 54 Stat. 1137, as amended by 58 Stat. 746 (1944), are unconstitutional.[1] **HELD:** That section of the Nationality Act of 1940 providing that a person who is a national of the United States shall lose his nationality by voting in a political election in a foreign state is a constitutional exercise of Congress' power to regulate relations of the United States with foreign countries, *Perez v. Brownell,* 78 Sup. Ct. 568 (1958).[2]

Prior to 1775, the doctrine of perpetual allegiance was well established in English law.[3] The American Revolution destroyed this doctrine, for this act amounted to mass self-expatriation.[4] As a consequence of the revolution and the continuing need for new citizens in the rapidly expanding nation, the early American legal philosophers came to consider self-expatriation as a basic human right.[5] This view was finally crystallized into legislation in 1868 when Congress declared the right of self-expatriation to be "a natural and inherent right."[6] This act of Congress was designed only to protect naturalized citizens from their foreign sovereigns, but the Act was construed as implying that United

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[1] Original action was brought in the U. S. District Court for the Northern District of California, Southern Division. From an adverse judgment, petitioner appealed. The Court of Appeals affirmed the decision, 235 F.2d 364, and petitioner brought certiorari. See also, case notes, 18 Univ. of Pitt. L. Rev. 816, 42 Minn. L. Rev. 486.

[2] Petitioner was denied citizenship under Section 401 of the Nationality Act which provides that "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

"(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

" . . . .

"(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

The court declined to consider the constitutionality of subsection (j).

[3] Calvin's Case, 7 Coke 1 (1608).

[4] The term *self-expatriation* has been adopted for the use of this case note to differentiate a purely voluntary act of expatriation from a forced divestment of citizenship *as the result of a voluntary action,* such divestment to be labeled *expatriation.*

[5] See Tsiang, The Question of Expatriation in America Prior to 1907, pp. 25, 40-43, 69. See also Wooldridge v. Wilkens, 3 How. 360 (Miss. 1838).

[6] 15 Stat. 223 (1868).

States citizens, both naturalized and native-born, could divest themselves of their United States citizenship.[7] The right of Congress to enumerate acts which would divest one of his citizenship, seems not to have been questioned throughout this period. Rather, the courts and the executive departments took for granted the power of Congress to enact such legislation.[8] Finally, in 1907, Congress set forth the acts by which an American citizen might be deemed to have expatriated himself.[9] Until the 1930's the few cases concerning expatriation were concerned with those citizens who (1) married foreign male citizens,[10] and (2) were taken, as children, back to their parent's homeland.[11] In 1940 the Nationality Act, under whose provisions the instant case arose, was passed as a result of a thorough study of the subject by a committee appointed by President Roosevelt. At this time there was still little concern over Congress' power to enact legislation governing expatriation, the members of the committee feeling certain that Congress could "make certain acts result in a loss of citizenship."[12] Following World War II, a number of cases arose involving the citizenship of former United States citizens of Japanese and Italian descent who had served in foreign armies and voted in foreign elections. At this time the constitutionality of section 401 came to be questioned. The major issue raised by these cases was the constitutional right of Congress to adopt legislation which will so operate as to deprive one of the citizenship granted him by the United States Constitution.[13]

In the instant case, the court has upheld the right of Congress to prescribe conditions for breach of which a citizen forfeits his citizenship. The court has ruled that this power is derived from the "necessary and proper" clause of the Constitution in connection with the right to regulate foreign affairs as set forth in the Constitution.[14] In so ruling, the court has extended the sovereign power of the government to a degree which might appear frightening upon reflection. Certainly the judges dissenting in the instant case show great concern over the possibility that this power might be abused by Congress in future legislation.[15] But in their dissenting opinions these judges all admit that citizenship may be "voluntarily renounced . . . by . . . actions in derogation of undivided allegiance to this country,"[16] and Justice Whittaker, though dissenting with the specific result as applied to the petitioner, agrees with the majority that "Congress may expatriate a citizen for an act which it may reasonably find to be fraught with danger of embroiling our Government in an international dispute or of embarassing it in the conduct of foreign affairs."[17] Thus it would appear that the major disagreement among the court involves not so much the power of Congress to set up "rules" governing expatriation, but rather the text of the "rules" themselves. That the court does not intend to sit idly by and allow Congress to adopt unjust "rules" governing expatriation is clearly indicated by the results of two other expatriation cases handed down the same day as the *Perez* case.[18] In the *Trop* case the court finds Section 401 (c) of the Nationality Act to be unconstitutional as creating "cruel and unusual punishment," though expatriation for war-time desertion had appeared settled by court action in the past.[19] In the *Nishikawa* case the court refused to pass on the constitutionality question at all, but found other means to defeat the government's case for expatriation. In summary, it appears that, while the court has affirmed the long held belief that Congress has the power to set up conditions governing expatriation, notice has been served that these conditions will be strictly construed so as to preclude any possibility of abuse of this power by Congress.

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[7] Op. Att. Gen., XIV, 295-296 (1873).

[8] Tsiang, op. cit. supra at 104. "Presidents Grant, Cleveland, Harrison, and Roosevelt repeatedly urged Congress to define the acts by which a citizen might be deemed to have lost or forfeited his citizenship." And see, Comitis v. Parkerson, 56 Fed. 556 (1893). ". . . the courts must carefully observe the lines of demarcation which the Congress has drawn; that any imperfections or inconsistencies in those lines must be supplied and corrected by Congress and not by the courts."

[9] Act of March 2, 1907. This act sets forth means by which an American citizen might be deemed to have expatriated himself including, (1) Naturalization abroad, (2) Service to a foreign state involving an oath of allegiance, (3) Domicile abroad for over five years with no intent to return.

[10] Mackenzie v. Hare, 239 U.S. 299 (1915).

[11] Perkins v. Elg, 307 U.S. 325 (1939).

[12] Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, 76th Cong., 1st Sess. There was some debate at this time whether the term "political election" might not be too broad in that voting in *any* political election does not necessarily indicate a renunciation of allegiance to the United States.

[13] Okimura v. Acheson, 99 F. Supp. 587 (1953), and Terada v. Dulles, 121 F. Supp. 6 (1954), where Justice McKenzie states, "The power of naturalization which Congress has under the Constitution is a power to confer citizenship, not a power to take it away."

[14] U.S. Const. art. I, § 8, cl. 18; U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). The theory behind the ruling in the instant case comes directly from the reasoning of Justice Sutherland in the Curtiss-Wright case. It has been said in respect to Justice Sutherland's approach, "There is even considerable basis for interpreting the Curtiss-Wright opinion to mean that there are no substantive limitations on the scope of the foreign relations power; that is, since it is an 'extra-constitutional' power, extra-constitutional acts cannot be unconstitutional." See 55 Yale L.J. 490.

Edwin E. Benoist, Jr.

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[15] Justice Douglas: "What the Court does is to make it possible for any one of the many legislative powers to be used to wipe out or modify specific rights granted by the Constitution, provided the action taken is moderate and does not do violence to the sensibilities of a majority of the Court." 78 S. Ct. at 588.

[16] Justice Warren states, "The citizen may elect to renounce his citizenship, and under some circumstances he may be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country." 78 S. Ct. at 581. Justice Douglas states, "While Congress can prescribe conditions for voluntary expatriation, Congress cannot turn white to black and make any act an act of expatriation." 78 S.Ct. at 586.

[17] 78 S. Ct. at 590.

[18] Trop v. Dulles, 78 S. Ct. 590, and Nishikawa v. Dulles, 78 S.Ct. 612. In the first case, petitioner, born in the U.S., was convicted in 1944 by a general court-martial of desertion. It was held that Section 401 (g) of the Nationality Act, authorizing expatriation of a person convicted by military court of desertion, was unconstitutional as beyond the war powers of Congress. The Court felt that expatriation in this instance amounted to a punitive measure and as such constituted cruel and unusual punishment. In the second case, the petitioner was of dual citizenship due to his American birth and the Japanese nationality of his parents. He was conscripted under Japanese law in 1941 while visiting that country. It was held that the government had failed to sustain its burden of proving voluntary conduct on the part of petitioner and the constitutionality of Section 401 (c) was not ruled on.

[19] See Kurtz v. Moffitt, 115 U.S. 487 (1885), In re Carver, 142 F. 623 (1906), and U.S. v. Snow, 27 Fed.Cas. 1255 (1887).

CONSTITUTIONAL LAW — FORFEITURE OF AUTOMOBILE USED IN TRANSPORTING NARCOTICS WHEN OWNER IS UNAWARE OF SUCH ACT

The possession of the vehicle on the occasion in question was secured by one Portwood, who represented to Richards, the owner, that he wanted to borrow the vehicle for a few minutes to drive over to his brother's apartment to change clothes. Portwood was arrested a few minutes after leaving the apartment with two dolophine pills in his pocket. The lending of the vehicle was gratuitous. Richards did not know or suspect that Portwood possessed any narcotics, or had ever possessed them. This suit for confiscation of the automobile was brought under a Texas statute[1] which provided for forfeitures of automobiles used in the unlawful transportation of narcotics. HELD: Affirmed. A state has power to confiscate the property of an innocent person used by a lawbreaker without the owner's consent when there has been an entrusting of the property by the owner to another. *State v. Richards,* 303 S.W.2d 393 (Tex. 1957).

It has long been the settled law that the owner of a vehicle, who has given consent to its operation by another, is not deprived of any constitutional right by the forfeiture of his property on account of the operator's violation of a statute even though such owner is without knowledge of or has failed to acquiesce in its illegal use.[2] The right of the government to enforce a forfeiture is not dependent on personal guilt of the owner, but the vehicle is condemned as the offender and becomes subject to seizure and forfeiture upon its use in violation of express provisions of the statute.[3] Because the policy of the law is to enforce rigid punishment for certain offenses, and because forfeiture is in rem, directed against the property seized, the courts have upheld forfeiture of property used for illegal purposes although the user was acting without knowledge of the owner.[4] The doctrine that the property of innocent owners, entrusted to persons who use it in violation of law, may be forfeited applies not only to federal law, but to the statutes of the various states. It is within the police power of a state to confiscate the property of an innocent person used by a lawbreaker without the owner's consent when there has been an entrusting of the property by the owner to another.[5] The purpose of the statutes is to curb the narcotics traffic, and the public interest to be protected outweighs the loss suffered b those whose confidence in others proves to be misplaced.[6] By entrus ing the vehicle to another, the owner accepted the risk that it woul be used contrary to law. However, to justify forfeiture of propert there must be some connection, either by agency, consent to operat or control the vehicle, knowledge or negotiation between the owner c the seized vehicle and person committing the crime.[7] The owner c an automobile may deny others the right to use it and his rights are pr tected unless he does entrust it to another.

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[1] Vernon's Ann. P. C., art 725 d.

[2] People v. One 1941 Ford 8 Stake Truck, 151 P.2d 895 (Cal. 1944); Van Oster v. Kansas, 272 U.S. 465 (1926); People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 159 P.2d 641 (1945); People v. One 1937 Plymouth, 37 Cal.2d 65, 98 P.2d 750 (1940); People v. One 1933 Plymouth, 13 Cal.2d 565, 90 P.2d 799 (1939); People v. One 1937 Buick, 89 Cal.2d 556, 201 P.2d 402 (1949); People v. One 1940 Chrysler, 77 Cal.2d 306, 175 P.2d 585 (1946); People v. One 1940 Ford V-8, 36 Cal.2d 471, 224 P.2d 677 (1950); People v. One 1940 Buick Sedan, 71 Cal.2d 160, 162 P.2d 318 (1945); State v. Roberts, 36 W. Va. 391, 68 S.E.2d 48 (1951); Quidley v. Commonwealth, 190 Va. 1029, 59 S.E.2d 52 (1950); People v. One 1951 Ford Sedan, 122 Cal. App. 2d 680, 265 P.2d 176 (1954); People v. One 1949 Cadillac, 126 Cal. 2d 410, 272 P.2d 873 (1954).

[3] 49 U.S.C. 781; United States v. One 1948 Cadillac Convertible Coupe, 115 F. Supp. 723 (1953); United States v. One 1951 Cadillac Coupe DeVille, 108 F. Supp. 286 (1952); United States v. One 1951 Oldsmobile Sedan, 135 F. Supp. 873 (1955).

[4] Commonwealth v. Certain Motor Vehicle, 261 Mass. 504, 159 N.E. 613 (1928).

[5] People v. Chevrolet Convertible Coupe, 45 Cal.2d 613, 290 P.2d 538 (1955); Phariss v. Kimbrough, 118 S.W.2d 661 (Tex. Civ. App. 1938); Skipper-Bivens Oil Company v. State, 115 S.W.2d 1016 (Tex. Civ. App. 1938).

Although it may seem that the statute in question produces harsh result in the present case, such legislation is necessary to comba the illegal traffic in narcotics with its disastrous effects upon the publi Any provision for the protection of the property rights of innocen owners would afford an easy means of evading the law. If an automobil used in transporting narcotics could be protected from the law by showing that the legal title was in someone else, then drugs would usuall be transported in automobiles belonging to others. The owner of a automobile may easily avoid forfeiture by refraining from lending i Considering the difficulty of enforcing the law if loaned vehicles wer protected, it is submitted that this type of statute will continue to b upheld.

George P. Cossar, Jr.

CONSTITUTIONAL LAW — INTERGOVERNMENTAL IMMUNITY

The Murray Corporation brought action against the City of Detroit and the County of Wayne to recover taxes, assessed by authorit of statute,[1] on the value of property which belonged to the Unite States Government, but which was in the possession of Murray Corporation to be used in carrying out a contract with the Governmen The United States intervened, claiming title to the property assessed HELD: Though the tax was styled a "personal property tax" and thoug the taxing statute did not expressly state that the person in possessio was being taxed for the privilege of storing or using Government property, there was no infringment of the federal government's constitutional immunity since the tax was in fact a privilege tax and not a tax upo the property itself.[2] (5-4) *City of Detroit v. Murray Corporation o America,* 78 S. Ct. 458 (1958).

Since *McCulloch v. Maryland,*[3] decided almost 150 years ago, i has been a well established principle of constitutional law that th property of the federal government, its agencies and instrumentalities are immune from direct taxation by a state government. The basis o the doctrine is said to arise from the necessity of preserving the dual system of the federal and state governments under our Constitution.[4] However, within the past two decades, it has been the tendency of the Court sharply to curtail the doctrine of constitutional immunity.[5] Salaries of governmental officials, both state[6] and federal,[7] have been removed from within the circle of immunity. Exemption from a tax levied on the income a lessee derives from a lease of government owned and controlled land is no longer tenable.[8] Privilege taxes which are assessed to contractors of the federal government are not objectionable,[9] for "mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from state control."[10] This is true even though the amount of the tax to be levied is measured by the value or amount of tax-exempt property.[11] Not only has the Court tended to narrow the application of the doctrine, it has also limited the grounds upon which a tax may be invalidated, for it is now accepted that the mere fact that the federal government may ultimately bear all or a part of the economic burden of a tax which a state may impose upon a third person who is doing business with the federal government is not a sufficient reason to hold the tax invalid.[12] The effect of this modern judicial trend is to allow the states to accomplish by indirect methods that which would be impossible if done by direct methods. It seems evident that the Court is following a line of form rather than substance, for in any event the economic burden which is ultimately borne by the Government is the same, whether the tax is charged to the contractor who in turn may simply add the tax burden to the contract price, or whether the tax is imposed directly against government property as such.[13] This fact seems to substantiate a conclusion that Mr. Chief Justice Marshall's famous dictum in *McCulloch v. Maryland*[14] has failed to impress the

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[6] People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 508, 159 P.2d 641 (1945)

[7] People v. One 1941 Buick Sport Coupe, 28 Cal.2d 692, 171 P.2d 719 (1946).

[1] The relevant statutory provisions are set forth in full in 6 Mich. Stat. Ann. § 7.1 - 7.234, 7.81 (1950), and 6 Charter, City of Detroit, c. II § 1, c. IV §§ 1, 7, 26, 27

[2] Reversing 132 F. Supp. 899 (E.D. Mich. 1955); and 234 F.2d 380 (6th Cir 1956).

[3] 17 U.S. (4 Wheat) 316 (1819).

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[4] Metcalf & Eddy v. Michaell, 269 U.S. 514 (1926); Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 78 P.2d 731 (1938); see McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819); Davis v. Elmira Savings Bank, 161 U.S. 275 (1896); Helvering v. Powers, 293 U.S. 214 (1934).

[5] For a comprehensive study of the doctrine of intergovernmental tax immunity see Powell, The Waning of Intergovernmental Tax Immunity, 58 Harv. L. Rev. 633 (1945); Powell, The Remnant of Tax Immunity, 58 Harv. L. Rev. 757 (1945).

[6] Helvering v. Gerhardt, 304 U.S. 405 (1938).

[7] Graves v. New York ex rel O'Keefe, 306 U.S. 466 (1939).

[8] Helvering v. Mountain Producers Corp., 303 U.S. 466 (1938); Choteau v. Burnet, 283 U.S. 691 (1931); Leatty v. State Treasurer, 297 U.S. 420 (1936).

[9] See e.g. James v. Dravo Contracting Co., 302 U.S. 134 (1937); Esso Standard Oil Co. v. Evans, 345 U.S. 495 (1953); United States v. City of Detroit, 78 S. Ct. 474 (1948); Annot., 95 ALR 1257 (1935); 144 ALR 347 (1938).

[10] Fidelity & Deposit Co. v. Pennsylvania, 240 U.S. 319 (1916); also see Alabama v. King & Boozer, 314 U.S. 1 (1941); Esso Standard Oil Co. v. Evans, supra note 9.

[11] See note 9 supra.

[12] James v. Dravo Contracting Co., 302 U.S. 134 (1937); Graves v. New York ex rel O'Keefe, 306 U.S. 466 (1939); Alabama v. King & Boozer, 312 U.S. 1 (1941); Curry v. United States, 314 U.S. 14 (1941); Esso Standard Oil Co. v. Evans, 345 U.S. 495 (1953); Federal Reserve Bank v. Department of Revenue, 339 Mich. 587, 64 N.W.2d 639 (1954); United States v. City of Detroit, 78 S. Ct. 474 (1958).

[13] See note 12 supra; also see 58 Harv. L. Rev. 633 (1945).

[14] ". . . the power to tax involves the power to destroy." 17 U.S. (4 Wheat) 316, 331 (1819).

Court in recent years.[15] The Court, in extending the state's taxin
power, has expressly overruled[16] or completely abandoned[17] an in
pressive number of earlier decisions, and, in so doing, has tended to o
scure the precise limits of implied constitutional immunity, thereb
injecting considerable confusion into this field of law.[18] The trend
the past twenty years is probably attributable to the Court's growin
recognition of the fact that the United States Congress may affor
immunity to its contractors if it desires.[19]

The principal case is certainly in line with the present judici
trend, but appears to go one step further in restricting the feder
government's freedom from state taxation, for the statute which con
ferred authority for the tax clearly created an ad valorem tax on th
property of the United States.[20] As is pointed out by Mr. Justice Ha
lan's dissenting opinion in the principal case, the majority of th
Court seems unconcerned with the obvious fact that the tax was on th
property of the Government, but considered the problem only fron

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[15] "The web of unreality spun from Marshall's famous dictum was brushe
away by one stroke of Mr. Justice Holmes' pen; 'The power to tax is not th
power to destroy while this court sits.'" Graves v. New York ex rel O'Keefe, 30
U.S. 466, 490 (1939) (concurring opinion).

[16] Collector v. Day, 78 U.S. (11 Wall) 113 (1870) and New York ex rel. Roger
v. Graves, 299 U.S. 401 (1936), overruled in Graves v. New York ex rel O'Keefe, 30
U.S. 466 (1939); Gillespie v. Oklahoma, 257 U.S. 501 (1922) and Burnet v. Coronad
Oil and Gas Co., 285 U.S. 393 (1932), overruled in Helvering v. Production Corpora
tion, 303 U.S. 370 (1938); Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928) an
Graves v. Texas Co., 298 U.S. 393 (1936), overruled in Alabama v. King & Boozer
312 U.S. 1 (1941).

[17] Brush v. Commissioner, 300 U.S. 352 (1937); Dobbins v. Commissioner of Eri
County, 41 U.S. (16 Peters) 435 (1842). Both of these cases are analogous to Collecto
v. Day, supra note 16. It must therefore be inferred that these cases have bee
overruled sub silentio. Wiseman v. Dyers, 189 Ark. 381, 72 S.W.2d 517 (1934)
People v. Texas Co., 85 Colo. 289, 275 P. 896 (1929); Graysburg Oil Co. v. Texas
278 U.S. 582 (1929). These cases are based upon the authority of Panhandle Oil Co
v. Mississippi, supra note 16, and are no longer tenable. United States v. Alleghen
County, 322 U.S. 174 (1944), is distinguished both in Esso Standard Oil Co. v
Evans, 345 U.S. 495, 499 (1953) and in the principal case. These fine lines of distinc
tion are pointed out in Mr. Justice Harlan's dissenting opinion in the principa
case: "[A]lthough the Court here purports to distinguish Allegheny, it seems to me
that the authority of that case has now been reduced almost to the vanishing
point . . . ." See also the dissenting opinion of Mr. Justice Whittaker and Mr
Justice Frankfurter in the principal case.

[18] "Looking backward it is easy to see that the line between the taxable and the
immune has been drawn by an unsteady hand." United States v. Allegheny County
322 U.S. 174, 176 (1944). Compare Esso Standard Oil Co. v. Evans, supra note 17
with Graves v. Texas Co., 298 U.S. 393 (1936). Compare Mr. Justice Holmes' opinion
in Gillespie v. Oklahoma, 257 U.S. 501 (1922), that "a tax upon the leases" was "a
tax upon the power to make them and could be used to destroy the power to make
them . . ." with his dissenting statement in Panhandle Oil Co. v. Mississippi, 277
U.S. 218 (1928) that "The power to tax is not the power to destroy while this
court sits." Compare Western Lithograph Co. v. State Board of Equalization, 11
Cal.2d 156, 78 P.2d 731, (1938), with M. G. West Co. v. Johnson, 20 Cal. App. 2d
95, 66 P.2d 1211 (1937), *cert. denied* 302 U.S. 638 (1937).

[19] In the principal case the majority opinion states: ". . . Congress is the proper
agency . . . to make the difficult policy decisions necessarily involved in determining
whether and to what extent private parties who do business with the Government
should be given immunity from state tax." Also see Carson v. Roane-Anderson Co.,
342 U.S. 232 (1952); City of Cleveland v. United States, 323 U.S. 329 (1945).

[20] See Mr. Justice Whittaker's dissenting opinion in the principal case for a
thorough discussion of the Michigan Statute under which the tax was levied.

the point of view of whether the statute could have constitutionally imposed a privilege tax on the Corporation. Acceptance by the Court of such a test, to determine future cases of this type, would very probably result in an increase of Congressional legislation for the purpose of granting tax immunity to contractors performing work for the federal government. It would seem, therefore, that the Court has gone as far as it can go without annihilating *McCulloch v. Maryland,* for the next step is to allow undisguised direct taxation of Government property itself. The Court has always refused to take the final step, and it seems safe to assume that they will continue to do so.

Newt P. Harrison

DOMESTIC RELATIONS — JURISDICTION FOR DIVORCE

In an action for divorce brought by the husband, a resident of California, on ground of desertion by the wife, a motion to dismiss for lack of jurisdiction was made by the wife. There was conflicting evidence presented as to whether the wife was sent to Mississippi by her husband, or whether she went of her own accord. At any rate she had physically remained in Mississippi for almost five years at the time the divorce proceeding was commenced. The wife testified that she had maintained her status as a registered voter and as a church member in California, possessing at all times the intent to return to the domicile of her husband. The court granted the divorce decree to the husband. HELD: Affirmed. The evidence was sufficient to warrant the conclusion that the wife was a bona fide resident of Mississippi within the meaning of the statute limiting jurisdiction of the court over divorce actions.[1] *Carter v. Carter,* 97 So.2d 529 (Miss. 1957).

The jurisdictional requirement, that one of the parties be a bona fide resident within the state for one year preceding the commencement of the suit, has been consistently interpreted by the Court to mean domiciled within the state for the period of time.[2] This is due to the interpretation placed upon the word "resident" in the divorce statute. The terms "resident" and "domicile" when used in connection with subjects of domestic policy are synonymous.[3] The courts of Mississippi are required to have jurisdiction not only of the persons, but of the marital status,[4] and the jurisdiction of this status is the domicile of either one or both of the parties. Following the common law concept of husband and wife being one person at law,[5] the general rule is that the domicile of a women when she marries is that of her husband,[6] even though she does not reside there,[7] unless she is abandoned by the husband. When the domicile is established by marriage, it will continue until another is acquired, and it will not be changed until it is clearly evidenced by removal to the new domicile with the abandonment of intent to return to the old.[8] The United States Supreme Court in *Davis v. Davis*[9] stated that where the existence of matrimonial domicile is the basis for the divorce proceeding,[10] and it is being questioned, the court should always use care in determining upon the available information in each case whether, in accordance with the general rule, it is the domicile of the husband. In the past, the above general rules and interpretations in divorce proceedings have been the well-established law in Mississippi.

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[1] Miss. Code Ann. § 2736 (1942).

[2] Clay v. Clay, 134 Miss. 658, 99 So. 818 (1924); Hairston v. Hairston, 27 Miss. 704 (1854); Lynch v. Lynch, 210 Miss. 810, 50 So.2d 378 (1951).

[3] Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938). Some of the other jurisdictions which hold this view are: Caheen v. Caheen, 233 Ala. 494, 172 So. 618 (1937); Darbie v. Darbie, 195 Ga. 769, 25 S.E.2d 685 (1943); Gleason v. Gleason, 159 Kan. 448, 155 P.2d 465 (1945); Levanosky v. Levanosky, 311 Mass. 638, 42 N.E.2d 561 (1942); Maloney v. Maloney, 288 N. Y. 532, 41 N.E.2d 934 (1942); Rogers v. Rogers, 130 F.2d 905 (D. C. Cir. 1942); St. John v. St. John, 291 Ky. 363, 163 S.W.2d 820 (1942); State ex rel. Duckworth v. District Ct., 107 Mont. 97, 80 P.2d 367 (1938); Ungemach v. Ungemach, 61 Cal. App. 2d 29, 142 P.2d 99 (1943); Wyrick v. Wyrick, 162 Mo. App. 723, 145 S.W. 144 (1912).

[4] Antoine v. Antoine, 132 Miss. 442, 96 So. 305 (1923).

In the *Carter* case, the court has apparently made an inroad upon the concept of domicile as a jurisdictional basis in divorce proceedings. They are clearly departing from the definition of "bona fide resident" set out in the *Bilbo* case,[11] as being synonymous with domicile, and that the domicile and legal residence of a married woman is that of her husband. Following *Suter v. Suter,*[12] the wife in the *Carter* case could not acquire domicile in Mississippi so as to enable her to bring divorce proceeding against her husband in California, for she, as the trial court found, had deserted him. The trial court upon the finding of this fact could have then dismissed for lack of jurisdiction.[13] This would have, as parties to the divorce proceeding, two persons, neither of whom were domiciled in Mississippi. In a recent New Mexico decision,[14] the court pointed out, in their discussion of a serviceman's divorce statute, the fact that domicile as a jurisdictional basis for divorce is not entitled to constitutional sanctity, even though it is a statutory requirement in the majority of States.[15] It has been suggested that under the modern statutes, changing the status of married women and departing from the common law theory of marriage, there is no reason why a wife may not acquire a separate domicile for every purpose known to law.[16] Whether the Mississippi Court will make further inroads upon the concept of domicile as a jurisdictional basis for divorce remains to be seen, for there is no definite statement by the court on this point in the instant case. It seems reasonable that considerations of policy may cause the Court to extend the jurisdictional bases for divorce beyond domicile alone. However, in establishing a liberal jurisdictional basis for divorce, we may run the danger of creating a divorce mill.

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[5] 2 Blackstone's Commentaries 433.

[6] Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938); Hairston v. Hairston, 27 Miss. 704 (1854); Suter v. Suter, 72 Miss. 345, 16 So. 673 (1895); Weisinger v. McGehee, 160 Miss. 424, 134 So. 148 (1931).

[7] United States ex rel. Boraca v. Schlotfeldt, 109 F.2d 106 (7th Cir. 1940).

[8] Lucia v. Lucia, 200 Miss. 520, 27 So.2d 774 (1946).

[9] 305 U.S. 32 (1938).

[10] The great majority of the States have matrimonial domicile as a basis for divorce proceedings. A concise survey of residence requirements for the forty-eight states is found in Bunkley and Morse's Amis, Divorce and Separation in Mississippi (1957).

[11] 180 Miss. 536, 177 So. 772 (1938).

[12] 72 Miss. 345, 16 So. 673 (1895).

[13] 2 Nelson, Divorce and Annulment § 21.08 (2nd ed. 1945).

[14] Wallace v. Wallace, 320 P.2d 1020 (N. M. 1958).

[15] "Power or authority of jurisdiction to grant a divorce in this country depends solely upon statute, and is not derived from the common law." Price v. Price, 202 Miss. 268, 32 So.2d 124 (1947).

[16] Shute v. Sargent, 67 N. H. 305, 36 Atl. 282 (1893).

Charles M. Deaton

EASEMENTS — CURTAILMENT OF RIGHT OF ACCESS — REGULATION OR PROHIBITION

Appellees own a nine acre tract of land in Jackson, Mississippi, bordered on the east by Highway 51 and on the south by Highway 80 and the clover-leaf. There was a natural division of the property by a creek that separated the tract into two distinct parts. The Highway Commission refused access to either highway from the southern portion in an effort to prevent the creation of additional traffic hazards. The Chancery Court of Hinds County held that the Commission could refuse such access but the landowner must be compensated therefor. Appellant contended that the restriction is a valid exercise of the police power in the interest of public safety. **Held**: Affirmed. This is not regulation but a prohibition of all right of access. The right of ingress and egress to an abutting property owner is a property right and cannot be taken without compensation therefor. *Mississippi State Highway Commission v. Spencer,* 101 So.2d 499 (Miss. 1958).

An abutting owner has certain property rights which arise from the ownership of property contiguous to the highway. Such rights are known as easements appurtenant to the land,[1] and consist of access,[2] view,[3] and light and air.[4] Although the precise origin of these rights is somewhat obscure,[5] courts today almost universally recognize their existence. The easement of access includes ingress and egress from the property to the highway in a reasonable manner.[6] Since the right of access is a significant factor in determining the value of the property, a complete denial of access is a taking of property for which just compensation must be paid.[7] However, the abutting owner's right is subordinate to the right of the state to regulate and control the public highways for the benefit of the traveling public.[8] Regulation of highway traffic has long been recognized as a valid exercise of the police power[9] and a reasonable restriction of the easement of access under the police power is not compensable.[10] Thus the question evolves, where should regulation under the police power[11] end and condemnation by the exercise of eminent domain[12] begin? In determining the answer to this question, courts should weigh the relative interests of the public against those of the individual owner, in order to arrive at a just balance.[13] The State must not be unduly restricted in its proper exercise of the police power in maintaining public safety, while at the same time effect must be given the eminent domain clause[14] to insure against the harsh results of an unreasonable loss to the abutting owner.

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[1] Morris v. Covington County, 118 Miss. 875, 80 So. 337 (1918); Allen Reed, Inc. v. Presley, 50 R.I. 53, 144 Atl. 888 (1929).

[2] Story v. New York Elevated R.R. Co., 90 N.Y. 122 (1882), is frequently cited as the foundation case for recognizing the right of access.

[3] Brown-Brand Realty Co. v. Saks & Co., 126 Misc. Rep. 336, 214 N.Y.S. 230 (1926); First National Bank of Montgomery v. Tyson, 133 Ala. 459, 32 So. 459 (1920).

[4] Field v. Barling, 149 Ill. 566, 37 N.E. 850 (1894); Townsend v. Eynstein, 93 N.Y. 537, 49 Atl. 629 (1910).

[5] Bachich v. Board of Control, 23 Cal. 2d 343, at 350, 144 P.2d 818 at 823 (1943). Chief Justice Holmes, in his dissent in Muhlker v. New York & Harlem R. R., 197 U.S. 544 at 573 (1904), stated courts could have just as reasonably and logically declared that the private rights of the abutting owner do not exist.

[6] Newman v. Mayor of City of Newport, 73 R.I. 385, 57 A.2d 173 (1948); Bachich v. Board of Control, supra note 5.

Each year an appalling number of automobile accidents contribute directly to the loss of thousands of lives and several million dollars worth of property damage. Statistics show that only 15 per cent of the mishaps on ordinary roads will occur on an equal mileage of limited-access highway.[15] Realizing that limited-access highways save man-hours, remove traffic congestion, and make automobile travel safer, it becomes imperative that such highways be established in the interest of public convenience and necessity.[16]

In order to establish a limited-access highway, the abutting owner's easement of access must be restricted and, in some instances, prohibited.[17] By maintaining too broad a concept of what constitutes a taking of the right of access under the eminent domain clause, future construction will be burdened with unreasonable costs, thus gravely depleting public funds.

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[7] 39 C.J.S., Highways, § 141; 25 Am. Jur., Highways, § 154; Laurel v. Rowell, 84 Miss. 435, 36 So. 543 (1904); Town of Clinton et al v. Mattie Turner, 95 Miss. 594, 52 So. 261 (1909); Hamilton v. Mississippi Highway Commission, 220 Miss. 340, 70 So.2d 856 (1954). These cases involved the closing of streets thus denying all access.

[8] Sauer v. New York, 206 U.S. 536 (1906); Kane v. New York Elevator R. Co., 125 N.Y. 164, 26 N.E. 278 (1891); Farrel v. Rose, 253 N.Y. 73, 170 N.E. 498 (1930).

[9] State ex rel. Suksdorf v. Superior Court, 169 Wash. 195, 13 P. 2d 460 (1932); 25 Am. Jur., Highways, § 253.

[10] City of San Antonio v. Pidgeonhole Parking of Texas, 311 S.W. 2d 218 (Tex. 1958). The Appellant city had denied all access to appellee's ultra-modern garage from Houston Street, one of the city's busiest streets. The only means of ingress and egress was from a minor street. This was ruled a valid exercise of the police power.

[11] Police power has been defined as the power which the state inherently has to restrict property rights without paying compensation by regulations tending to promote the public health, safety, morals, and general welfare. 11 McQuillin, Municipal Corporations 263 (3d. ed., Smith 1950).

[12] Mugler v. Kansas, 123 U.S. 623 (1887), declares eminent domain to be the power to appropriate private property for a public use upon payment of just compensation.

[13] Woolf v. Fuller, 87 N.H. 64, 74 Atl. 193 (1934).

[14] Miss. Const., art. 3, § 17.

[15] 3 Stan. L. Rev. citing American Road Builders' Association, Highway Economics and Design Principles (Bull. No. 67, 1940).

[16] State, By and Through State Highway Commission v. Burk, 200 Or. 211, 265 P.2d 783 (1954).

[17] Alexander Co. v. City of Owatonna, 24 N.W. 2d 244 (Minn. 1946). The court held that a complete denial of vehicular access was a valid exercise of police power on the theory that since appellant could go into another type business that did not require vehicular access, this was not an unreasonable loss. Such a decision would seem to render the right of access practically valueless.

The *Spencer* case is the first in which the Mississippi Supreme Court has had an opportunity to rule on the precise question of where the police power ends and eminent domain begins. Though the case seemingly follows landmark decisions in other jurisdictions which liberally construe prohibition in an effort to protect the private interest of the abutting owner,[18] the case actually turned on the unique fact that the creek divided the property into "two separate economic units."[19] In two very recent subsequent decisions,[20] Mississippi has followed the more progressive view that recognizes the duty of the State to regulate access without the payment of compensation under the police power.[21] Rather than insisting that every restriction is "damage" to the property owner within the meaning of eminent domain, our Court appears to construe what would have been prohibition in the days of limited travel as regulation in the light of today's economic and safety realities. Convenience, economy, and public safety, all demand that the State be given a wider discretion in the regulation of access rights.

Dewitt T. Hicks, Jr.

Titles — Right Of Mortgagee To Purchase And Assert Tax Title Against Mortgagor

In an action to quiet title to a home and lot, it appeared that plaintiff's father purchased the mortgage on the land in question, at which time the mortgage was in default and the taxes unpaid for a four year period. He attempted to foreclose the mortgage but could not obtain service on the defendant. After removing the tenants, plaintiff went into possession of the property, made improvements, and purchased the tax title. The lower court held that a mortgagee, by purchasing the tax title, could not obtain the property as against the mortgagor; but that the property must be held in constructive trust for the mortgagor. **Held:** Affirmed. *Crofts v. Johnson,* 6 Utah 2d 350, 313 P.2d 808 (1957).

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[18] Analone v. Metropolitan District Commission, 153 N.E. 325 (Mass. 1926); Gulf Refining Company v. City of Dallas, 10 S.W. 2d 151 (Tex. 1928); Howell et al. v. Board of Commissioners for City of Quitman, 149 S.E. 779 (Ga. 1929); In re Appropriation of Easement for Highway Purposes, 112 N. E. 2d 411, (Ohio 1952); Newman v. Mayor of City of Newport, 73 R.I. 385, 57 A.2d 411 (1948).

[19] An expert witness for the Highway Commission testified that the cost of constructing a bridge over the creek to enable the owner to go from the property south of Town Creek to the northern portion (where appellee's only means of access is permitted) was approximately $28,000.

[20] Muse v. Mississippi State Highway Commission, 103 So.2d 839 (Miss. 1958); Harreld v. Mississippi State Highway Commission, 103 So. 2d 852 (Miss. 1958). Chief Justice McGehee in the Harreld case stated: "It has always been true in this country and in other countries that the citizen has been proud of his rights, and has been alert to protect them, but sometimes the time comes when the citizen must exercise the even higher right of giving up what he conceives to be his right in the interest of the public welfare."

[21] For strong decisions following this view see Farmers-Kissinger Market House Co., Inc. v. City of Reading, 2 A.2d 842 (Pa. 1938); City of San Antonio v. Pidgeonhole Parking of Texas, note 10 supra; Wood v. City of Richmond, 148 Va. 400, 138 S.E. 560 (1927); Alexander Co. v. City of Owatonna, note 17 supra.

In jurisdictions where this question has arisen, a majority of courts have adhered to the rule that the mortgagee cannot purchase the mortgaged land at a tax sale while the relationship of mortgagor and mortgagee exists, and hold title as against others having an interest in the property.[1] This rule has been applied in many cases without regard to whether the mortgagee was in possession or merely had a lien on the property.[2] When the mortgagee is in possession, receiving the rents and profits, the courts are almost unanimous in denying the right of the mortgagee to purchase the tax title.[3] The true reason for this result is that the mortgagee in possession is under a duty to pay the taxes, and to permit him or any other person receiving the rents and profits to obtain title through his failure to perform this duty, would be to allow him to take advantage of his own wrong.[4] However, many courts base their decision on the mortgagor-mortgagee relationship alone.[5] The greater conflict of authority arises when the mortgagee has only a lien on the property, although most courts apply the same rule.[6] In Mississippi, as in many other states, the mortgagee has the right to pay the taxes and obtain an additional lien on the property[7] or to redeem the land in part after it has been sold for taxes.[8] Perhaps this is a primary reason the mortgagee is not given the additional rights of purchase at the tax sale as a stranger to the title.[9] The proponents of this rule all realize that it is based on the idea that the mortgagee owes a duty to pay the taxes. Since no express duty is evident, many and varied analogies are used to find such a duty. Some courts merely state that the mortgagee is under this duty and search no further.[10] Others base their decision on public policy, saying that it is to the interest of the state that taxes be promptly paid; and if the mortgagor does not do so, the obligation falls upon the mortgagee as a matter of public interest.[11] It has been said that it is well established that a mortgagee may not assert a tax title against the mortgagor since a trust relation arises in which the mortgagee becomes a trustee and is not only debarred from acquiring title himself but is under an obligation to pay the taxes as a means of protecting the trust property against a hostile title.[12] Of course this would be true, a fortiori, where the mortgagee was the agent of the mortgagor for collection of the rents and profits.[13] These courts stress the community of interest of the parties in preserving the estate by payment of taxes, drawing the conclusion that it would be inequitable conduct for one to acquire and assert a tax title against the others, or that presumably payment was made for the common protection.[14] Sometimes the analogy of tenants in common is announced as the reason compelling the mortgagee to pay the taxes.[15] Where the relationship of mortgagor-mortgagee came into existence after the purchase of the tax title,[16] and, also where the relationship no longer existed at that time,[17] the mortgagee may assert his title even in jurisdictions applying the majority rule. However, if the mortgagee purchases only with the purpose to protect the property, his intention to buy for the common good will preclude his assertion of title against the mortgagor.[18]

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[1] Stinson v. Conn. Mutual Life Ins. Co., 174 Ill. 125, 51 N.E. 193 (1898); Elben v. Major, 147 Ky. 44, 143 S.W. 748 (1912); Koch v. Kiron State Bank, 203 Iowa 206, 297 N.W. 450 (1941).

[2] See note 1 supra.

[3] Allen v. Dayton Hotel Co., 95 Tenn. 480, 32 S.W. 962 (1895); Dusenbery v. Bidwell, 86 Kan. 666, 121 P. 1098 (1912); Findley v. Tyler, 300 S.W. 2d 598 (Ark. 1957).

[4] Pool v. Ellis, 64 Miss. 555, 1 So. 725 (1896), in which it was held that if the purchaser of land at an administrator's sale pays the purchase price and goes into possession of the land before a confirmation of the sale, he cannot acquire a tax title thereto, since, if by reason of the appropriation of a part of the purchase money to the payment of the debts of the intestate he should be regarded as having an equitable charge upon the land, he would occupy the position of a mortgagee in possession receiving the rents and profits of the estate. Therefore, a purchase by him at the tax sale should be treated only as a payment of the common charge made for the benefit of the whole estate. If on the other hand he should be regarded as a mere intruder, liable to the owners for the rents of the lands, these rents, which in the instant case exceeded the amount paid for taxes, ". . . would operate *eo instanti* as payment of the amount expended in the purchase and as a redemption of the property."

[5] See note 3 supra.

[6] Farmer v. Ward, 75 N.J. Eq. 33, 71 Atl. 401 (1908); Des Moines Savings Bank and Trust Co. v. Eisenmenger, 183 Minn. 46, 235 N.W. 390 (1931); Pearce v. Montague, 209 N. C. 42, 182 S.E. 707 (1935); Person v. Miller Levee District, 202 Ark. 173, 150 S.W. 2d 950 (1941); David Oil Co. v. Fogle, 354 Pa. 150, 47 A.2d 209 (1946).

[7] Miss. Code Ann. §§ 9963-9965 (1942).

[8] Miss. Code Ann. §§ 9950-9952 (1942).

[9] In Perkins v. White, 208 Miss. 157, 43 So.2d 897 (1950), the court set forth the general rule that the mortgagee could not acquire property at a tax sale as long as the relationship of mortgagor and mortgagee existed, at least where the mortgagee has merely a lien on the mortgaged property, and where he can, if he chooses, pay the taxes upon default of the mortgagor and add the amount so paid to his claim. The court then disposed of this question by finding that the relationship of mortgagor-mortgagee no longer existed and allowed the former mortgagee to hold the title. See also McLaughlin v. Green, 48 Miss. 175 (1873).

While most jurisdictions follow the rule already announced, there is a strong minority which hold that the mere existence of the relationship of mortgagor-mortgagee does not in itself preclude the latter from obtaining and asserting a paramount tax title against the mortgagor.[19] Where the mortgagee is out of possession and under no express contractual duty to pay the taxes, these courts refuse to find a fiduciary duty growing from a relationship which is actually adversary. They also reject the contention that the state imposes such an obligation and allow the mortgagee to purchase as a stranger to the title subject only to the mortgagor's right to redeem.[20] Certainly the text-writers adopt the minority view and assert that there is no valid basis on which to rest the mortgagee's duty to pay taxes. One author points out that the only reasonable foundation for the majority result is that it is against public policy to allow the mortgagee, by leaving the taxes unpaid, to acquire a tax title and to save the costs of foreclosure.[21] Even this proposition has been attacked by the writers of *The American Law of Real Property*.[22]

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[10] Stinson v. Conn. Mutual Life Ins. Co., 174 Ill. 125, 51 N.E. 193 (1898); Marwalt Realty Co. v. Green, 224 Wis. 1, 271 N.W. 648 (1937).

[11] Conn. Mutual Life Ins. Co. v. Bulte, 45 Mich. 113, 7 N.W. 707 (1881). "It certainly cannot be said that the second mortgagee owes any duty to the first mortgagee to protect his lien against tax sale. Neither, on the other hand, does the first mortgagee owe any such duty to the second mortgagee, or to the mortgagor. To the state each one of the three may be said to owe the duty to pay the taxes; and the state will sell the interest of all if none of the three shall pay." See also Des Moines Savings Bank and Trust Co. v. Eisenmenger, 183 Minn. 46, 235 N.W. 390 (1931); Ragor v. Lomax, 22 Ill. App. 628 (1887); 46 Yale L. J. 334 (1936).

[12] Finalyson v. Peterson, 11 N.D. 45, 89 N.W. 855 (1902); Ten Eyck v. Craig, 62 N.Y. 406 (1875); Pearce v. Montague, 209 N.C. 42, 182 S.E. 707 (1935).

[13] Wall v. Hammer, 182 La. 1049, 162 So. 769 (1935).

[14] Fair v. Brown, 40 Iowa 209 (1875); Woodbury v. Swan, 59 N.H. 22 (1879); Hall v. Westcott, 15 R.I. 373, 5 Atl. 629 (1886).

[15] Conn. Mutual Life Ins. Co. v. Bulte, 45 Mich. 113, 7 N.W. 707 (1881).

[16] Eaton v. McCarty, 34 Idaho 747, 202 P. 603 (1921); Middletown Savings Bank v. Bacharach, 46 Conn. 513 (1879).

[17] Ensley v. Coolbaugh, 160 Mich. 299, 125 N.W. 279 (1910); Perkins v. White, 208 Miss. 157, 43 So.2d 897 (1950).

[18] Martin v. Swofford, 59 Miss. 328 (1881).

[19] Moore v. Boagni, 111 La. 490, 35 So. 716 (1903); McLaughlin v. Acom, 58 Kan. 514, 50 P. 441 (1897); Cornell v. Woodruff, 77 N.Y. 203 (1879); Jones v. Black, 18 Okla. 344, 88 P. 1052 (1907).

One may conclude that the reason which is the basis for denying a mortgagee the right to purchase the tax title is a duty arising from some fiduciary relationship found to exist between the mortgagor and mortgagee. Certainly this "fiduciary" duty is not contractual. Therefore, it appears that the courts find a fiduciary relationship in a situation where the interests of the parties are actually adverse. Other courts, realizing that the mortgagee is under no obligation to the mortgagor to pay the taxes, announces that the state imposes such a duty. However, there are few, if any, states which have statutes imposing this obligation, so it must arise judicially. As to the mortgagee in possession, a duty to pay the taxes can easily be based upon the fact that any person in possession of real property, receiving the rents and profits, is under a duty to pay the taxes without regard to the fact that he is also a mortgagee. But, this is not so with respect to the mortgagee out of possession. Here, no such duty exists and the courts seem to be in error in finding that it does exist. If a duty is to be imposed, it should not be explained as a consequence of the mortgagor-mortgagee relationship. In the absence of a contractual obligation, the mortgagee should be allowed to elect his remedy and, if he so desires, to purchase the tax title as a stranger to the property. Such election would extinguish the mortgage debt, thus avoiding the problem of the mortgagee occupying inconsistent positions.

Jack W. Brand

TORTS — RES IPSA LOQUITUR — APPLICABILITY AGAINST MULTIPLE DEFENDANTS

Plaintiff alleged in the complaint that he was operating his automobile upon a public highway; that preceding plaintiff was the automobile operated by defendant, Key; that defendant, Key, negligently allowed luggage to fall upon the highway from a luggage carrier attached to the top of his car; that plaintiff thereby was compelled to stop and immediately thereafter was struck from the rear by defendant, Hosang's, automobile. HELD: Doctrine of res ipsa loquitur was applicable against defendant, Key, even though specific acts of negligence were pleaded gainst defendant, Hosang. *McCarty v. Hosang, et al.*, 154 *F. Supp.* 852 S.D. Mo. 1957).

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[20] Waterson v. Devoe, 18 Kan. 223 (1877).
[21] 5 Tiffany, Real Property, § 1425 (3rd Ed. 1939).
[22] 4 American Law of Real Property, § 16.106J.

In order to invoke the doctrine of res ipsa loquitur,[1] three prereuisities must be satisfied.[2] Consistent with the requisities, and particlarly with the one stating that the defendant must have exclusive ontrol over the instrumentality causing the injury, courts have recogized that there are several types of cases in which the doctrine may be roperly applied against multiple defendants. It may be applied where icarious liability exists,[3] or where there are joint tortfeasors,[4] or joint ontrol[5] over the instrumentality causing the injury. But if the plainiff cannot establish that his case is one of the particular types, then he general rule is that the plaintiff cannot properly apply the docrine.[6] However, a few recent cases have established an exception to the onventional requirement of exclusive control by upholding the appliability of the doctrine against doctors, nurses, and an anesthetist for njuries received by a patient.[7] That the departure was not confined to he existence of some special duty is illustrated by another case[8] in which the doctrine was held applicable against the owner of a water heater, which leaked and flooded plaintiff's premises, and a plumbe who had previously made repairs to the heater.

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[1] Some leading articles concerning the nature and effect of the doctrine of res psa loquitur are: aCrpenter, The Doctrine of Res Ipsa Loquitur, 1 U. Chi. L. Rev. 19 (1934); Malone, Res Ipsa Loquitur and Proof of Inference, 4 La. L. Rev. 70 (1941); Heckel and Harper, Effect of the Doctrine of Res Ipsa Loquitur, 22 Ill. L. Rev. 725 (1928); Prosser, The Procedural Effect of Res Ipsa Loquitur, 20 Minn. L. Rev. 241 (1936); Prosser, Res Ipsa Loquitur in California, 37 Cal. L. Rev. 183 (1949).

[2] The prerequisites usually stated as necessary for the application of the docrine are: (a) the accident must be of a kind which ordinarily does not occur in the bsence of someone's negligence; (b) the accident must be caused by an agency or nstrumentality within the exclusive control of the defendant; (c) the accident must not have been due to any voluntary action or contribution on the part of the plaintiff. Wigmore, Evidence, § 2509 (3d ed. 1940).

[3] Knell v. Morris, 39 Cal. 2d 450, 247 P.2d 352 (1952); Schroeder v. City & County Saving Bank of Albany, 293 N. Y. 370, 57 N.E.2d 57 (1944); Weddle v. Loges, 52 Cal. App. 2d 115, 125 P.2d 914 (1942) (principal and agent); Hinds v. Wheadon, 19 Cal. 2d 458, 121 P.2d 724 (1942) (master and servant).

[4] Price v. McDonald, 7 Cal. App. 2d 77, 45 P.2d 425 (1935); Pierce v. Schroeder, 171 Kan. 259, 232 P.2d 460 (1951).

[5] Waterbury v. Riss & Co., 169 Kan. 271, 219 P.2d 673 (1950); Kelly v. Laclede Estate & Invest. Co., 348 Mo. 407, 155 S.W.2d 90, 138 A.L.R. 1065 (1941); Heny v. Carlson, 6 N.J. 82, 77 A.2d 245, 22 A.L.R. 1160 (1950).

[6] Actiesselskabet Ingrid v. Central R.R. of N.J., 216 Fed. 72 (2d Cir. 1914); Kirchmer v. Kulman, 335 Ill. App. 339, 79 N.E.2d 628 (1948); Wolf v. American Tract Society, 164 N.Y. 30, 58 N.E. 31 (1900).

[7] Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258 (1944). Here the plaintiff developed paralysis and atrophy of the muscles around the shoulders after having undergone an appendectomy in a hospital. He sued the doctor who had arranged his admission into the hospital, the surgeon performing the operation, the owner of the hospital, the anesthetist, and two nurses. The plaintiff was unable to show which particular defendant had caused the injury. In reversing the trial court's judgment of nonsuit in favor of the defendants, the California Supreme Court said:

> "That where a plaintiff received unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct."

At the second trial judgment was rendered in favor of plaintiff against all defendants. Ybarra v. Spangard, 93 Cal. App. 2d 43, 208 P.2d 445 (1945). Accord: Meyer v. St. Paul-Mercury Idem. Co., 61 So.2d 901 (La. App. 1952).

[8] Knell v. Morris, 39 Cal. 2d 450, 247 P.2d 352 (1952); in accord Coca-Cola Bottling Co. v. Lowe et al., 275 S.W.2d 47 (Ky. App. 1955) where plaintiff brought action against the bottling company and the owners of a grocery store for injuries

The instant case presents no difficulty concerning the question o departing from the exclusive control requirement. Though the cour stated that the propriety of the application of the doctrine was premature,[9] there were two alleged injuring instrumentalities:[10] to one the plaintiff predicated the doctrine of res ipsa loquitur and to the othe specific acts of negligence. In this particular multiple defendant situation, it appears that a plaintiff may prove specific negligence of one defendant without losing, as against the co-defendant, the right to rely on res ipsa loquitur.[11] However, the applicability of the doctrine to a plurality of defendants remains a disputed question in cases where the plaintiff can show no individual defendant who possesses exclusive control over the injuring instrumentality.[12] When a plaintiff has been injured by an unusual accident to which he has in no way contributed, and the accident is of a kind that would not have happened had proper care been exercised over the instrumentality causing the injury, is it desirable to afford the plaintiff no remedy predicated upon the doctrine of res ipsa loquitur merely because there was no joint or vicarious control over the agency which caused his injury? It is submitted that this is undesirable. It should be remembered, as was pointed out in a recent Iowa case,[13] that the doctrine of res ipsa loquitur is a simple, understandable rule of circumstantial evidence with a sound background of common sense and human experience. The difficulty comes only when it is transformed into a rigid legal formula, which precludes its application in the many cases where it is most important that it should be applied.[14]

Jerome B. Steen

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sustained when a Coca-Cola advertising sign, hanging on an outside wall of the store fell and struck her on the head and shoulders. The Court held that under the evidence as to ownership, management, control and maintenance of the sign, it would have been proper to have directed a verdict in favor of the plaintiff against both defendants, under the doctrine of res ipsa loquitur.

[9] McCarty v. Hosang et al., 154 F. Supp. at 852 (S.D. Mo. 1957).

[10] McCarty v. Hosang, et al., supra note 9 at 854.

[11] Clair v. McAlister, 216 Cal. 95, 13 P.2d 924 (1932); Dieterle v. Yellow Cab Co., 34 Cal. App. 2d 97, 93 P.2d 171 (1939); Whylie v. Craig Hall, Inc., 272 App. Div 603, 74 N.Y.S.2d 128 (1947).

[12] See note 6 supra.

[13] Frost v. Des Moines Still College of Osteopathy and Surgery, et al., 79 N.W. 2d 306 (Iowa 1956).

[14] Courts and text writers are not in agreement concerning the effects of the doctrine of res ipsa loquitur. Some say a permissable inference has arisen while others say a presumption has arisen. Courts holding that a presumption has arisen, say that by virtue of the presumption the defendant must come forward with some evidence sufficient to rebut the presumption, and in the absence of such evidence the plaintiff is entitled to a directed verdict as a matter of law. Thus under the presumption view, the defendant must go forward with the evidence in order to escape the operation of the doctrine. It is submitted that under the presumption view courts are supplied with the legal rationale to apply the doctrine against multiple defendants. Then in a situation similar to the facts in the Ybarra case, supra note 7, res ipsa loquitur would require each defendant, if he desired to escape liability, to come forward with an explanation tending to show his absence of control over the injuring instrumentality, since he is in a much better position to explain his behavior than the unconscious plaintiff.

Torts — Unavoidable Accident — Not Compensatory

Dick Jezek, deceased, climbed near the top of a utility pole for the purpose of affixing a banner advertising a rodeo. While sitting astride the pole, he contacted an electric wire and received an electrical shock which resulted in his death. The appellant, Texas Power and Light Company, had a contract with the Telephone Company to attach its wire to the telephone pole. The National Electric Code requires a 40 inch clearance between the telephone cable and the lowest electric wire, where both type wires are attached to the same post. The undisputed evidence showed that the appellant's electric wire was only 36 inches above the telephone cable. The jury was instructed that if they found this to be an unavoidable accident there could be no liability. The jury found that the death was the result of an unavoidable accident but allowed an $8,000.00 recovery. Appellant filed its motion for judgment *non obstante veredicto,* which was overruled, and the Court granted appellee's motion to disregard the jury's finding that it was an unavoidable accident. **Held**: Affirmed. Failing to maintain the electric wire with the proper clearance was negligence per se and voids the inference of an unavoidable accident. *Texas Power & Light Company v. Jezek,* 302 S.W. 196 (Tex. 1957).

An unavoidable accident is an unintended occurrence which could not have been prevented by the exercise of reasonable care.[1] It is an event in which none of the parties are negligent and no negligence is involved.[2] In the instant case, it was negligence per se to maintain the electric wires 36 inches above the telephone cables when the National Electric Code required a minimum clearance of 40 inches. The general rule is that negligence per se is not actionable unless it is the proximate cause of the injury.[3] An accident is regarded as unavoidable when it is so unlikely to happen that the risk would commonly be disregarded, such as an unpredicted flood,[4] frost,[5] an automobile thrown unexpectedly against a pillar on the corner,[6] a child picking up a plank with a nail in it and dropping it on his foot,[7] or a pedestrian slipping on a small bit of gravel in the highway.[8] In general, there is no liability for an unavoidable accident.[9] Upon the same basis, the driver of an automobile, who is suddenly seized with a fainting fit, has been held not liable for the damage done by his car.[10] There may be negligence in driving at all when the driver knows he is subject to certain attacks, such as epileptic fits,[11] or falling asleep.[12] The uniform rule is that, in the absence of some wrongful intent or negligence, there is no liability.[13] The "unlawfulness" of the act must consist of the harm protected by the statute or there is no liability, because the result could not have been avoided by reasonable care in the act itself.[14]

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[1] Prosser, Torts 117 (2d ed. 1955).

[2] Leeper v. Nelson, 139 Cal. App. 2d 65, 293 P. 111 (1956); Einfeldt v. Watkins, 6 Ill. App. 2d 205, 126 N.E. 2d 864 (1955); Frel v. Brownlee, 56 N. M. 677, 248 P. 671 (1952); Marsh v. Chesney, 11 Ill. App. 2d 577, 138 N. E. 2d 97 (1956); Parker v. Womack, 37 Cal. 2d 116, 230 P.2d 823 (1951); Keating v. Zumwalt, 91 Cal. App. 2d 845, 206 P.2d 10 (1949); Hartman v. Dunn, 186 Okl. 9, 95 P.2d 897 (1939); Lynch v. Defino, 114 Cal. App. 2d 128, 249 P.2d 615 (1952).

[3] Nisbet v. Van Tuyl, 224 F.2d 66 (1955); Valley Transport System v. Reinartz, 67 Ariz. 380, 197 P.2d 269 (1948); Cruce v. Taylor, 89 Ga. App. 611, 80 S.E.2d 704 (1954); Chapman v. Associated Transport, 218 S. C. 554, 63 S.E.2d 465 (1951); Claypool v. Mohawk Motor, 155 Ohio St. 8, 97 N. E. 2d 32 (1951); Satterlee v. Orange Glenn School District, 29 Cal. 2d 581, 177 P.2d 279 (1947).

[4] McCaulye v. Logan, 152 Pa. 202. 25 Atl. 499 (1893); Power v. Village of Hibbing, 182 Minn. 66, 233 N.W. 597 (1930); Louisville & N. R. Co. v. Finlay, 237 Ala. 116, 185 So. 904 (1939); Pleasure Beach Park Co. v. Bridgeport Dredge and Dock Co., 116 Conn. 496, 165 Atl. 691 (1933).

[5] Blyth v. Birmingham Waterworks Co., 11 Exch. 781 (1856); Sutphen v. Hedden, 67 N. J. L. 324, 51 Atl. 721 (1902); Missouri Pac. R. Co. v. Columbia, 65 Kan. 390, 69 P. 338 (1902).

[6] Leachman v. City of Louisville, 270 Ky. 260, 109 S.W.2d 614 (1937); Martin v. Hodson, 93 N. H. 66, 35 A.2d 402 (1943) (car swerving on wrong side of road).

[7] Spiering v. City of Hutchinson, 150 Minn. 305, 185 N. W. 375 (1921); Chipokas v. Peterson, 219 Iowa 1072, 260 N.W. 37 (1935) (child darting out in path of

It appears then that the principal case is but another in a long line of decisions attempting to settle, in future cases, whether the event, under all the circumstances, was an unavoidable accident. There are no fixed and permanent rules which courts are obligated to apply because of the numerous factors that must be considered in ascertaining whether negligence was involved. In *City of Greenville v. Laury*,[15] the Supreme Court of Mississippi said: "Actionable negligence is not determinable alone from the doing of an act resulting in injury to another. Such an act . . . creates liability only when the circumstances attending it are such that the actor should have inferred that the doing of the act 'creates an appreciable chance of causing injury to another.'" It is submitted that the determination of what is an unavoidable accident will be made by the courts on the facts of each particular case.

Eugene B. Gifford

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vehicle); Johnson v. Wichita Valley R. Co., 104 S.W.2d 128 (Tex. Civ. App. 1937) (chip struck out by adz flying into eye); Will v. 1527-31 Wicker Park Ave. Bldg. Corp., 328 Ill. App. 214, 115 A. L. R. 1495 (1946) (piece of steel from hammer flying 15 feet); Hochberg v. Green, 162 N.Y.S. 983 (1917) (horse on street shaking head and knocking boy down).

[8] Missouri Pac. R. Co. v. Richardson, 185 Ark. 472, 47 S.W.2d 794 (1932); Clergon v. Thompson, 62 Kan. 727, 64 P.2d 605 (1901) (deflection of bullet); Gagon v. Divittorio, 310 Mass. 475, 64 N.E.2d 629 (1941) (cuff on coat sleeve caught on truck); Scurfield v. Federal Laboratories, 335 Pa. 145, 6 A.2d 559 (1939) (accident with tear gas gun); City of Greenville v. Laury, 172 Miss. 118, 159 So. 121 (1935) (crack in sidewalk); Mann v. Pulliam, 344 Mo. 543, 127 S.W.2d 426 (1939) (step).

[9] Steudle v. Rentchler, 64 Ill. 161 (1872).

[10] Cohen v. Petty, 65 F.2d 820 (D.C. Cir. 1933); Wishone v. Yellow Cab Co., 20 Tenn. App. 229, 97 S.W.2d 452 (1936); Armstrong v. Cook, 250 Mich. 180, 229 N.W. 433 (1930); Ford v. Carew & English, 89 Cal. App. 2d 199, 200 P.2d 828 (1948); contra, Leary v. Oates, 84 S.W.2d 486 (Tex. Civ. App. 1935). In Sauers v. Sack, 34 Ga. App. 748, 131 S.E. 98 (1921), an epileptic fit was treated as analogous to insanity and the defendant was held liable.

[11] Eleason v. New York R. Co., 254 Wis. 134, 35 N.W.2d 301 (1948); Goldman v. New York Rys. Co., 185 App. Div. 739, 173 N.Y.S. 737 (1919).

[12] Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); Baird v. Baird, 223 N. C. 730, 28 S.E.2d 225 (1943); Manser v. Eder, 263 Mich. 107, 248 N. W. 563 (1933); Felton v. Horner, 97 Tenn. 579, 37 S. W. 696 (1896) (aged and infirm person risking jolt of train).

[13] Brown v. Kendall, 6 Cush. 292, 60 Mass. 292 (1850) (the defendant, in trying to stop a dog fight, raised his stick and accidently struck a man behind him).

[14] Bourne v. Williams, 209 Mass. 155, 95 N. E. 404 (1911) (driving automobile without license); Cobb v. Cumberland County Power & Light Co., 117 Me. 455, 104 Atl. 844 (1918) (driving unregistered automobile); Muller v. West Jersey & S. R. Co., 99 N. J. L. 186, 122 Atl. 693 (1923) (automobile driver not licensed may recover); Brown v. Shyne, 242 N. Y. 176, 151 N. E. 197 (1926) (practicing medicine without a license).

[15] 172 Miss. 118, 159 So. 121 (1935).

RECENT BOOKS

PURITANS, LAWYERS, AND POLITICS IN EARLY SEVENTEENTH CENTURY ENGLAND.

By John Dykstra Eusden. New Haven: Yale University Press, 1958. $4.50.

Every scholar's work begins with a theory. Without one it is very doubtful if many research projects would even be initiated. The ideal, as often stated, is of course to the contrary. To the formulators of the ideal, a book begins by a worker wandering idly into a library where he turns over materials until he produces something of objective value devoid of bias. Without saying no work ever was produced by this approach, it is most doubtful. The motivation of the scholar is generally a desire to prove in print what he is convinced in his mind's recesses must be so. Unfortunately, for the good of science, the proof adduced is too often molded to conform to the pre-existing theory. Often enough a reader feels the author would have done better to have put his striking idea in a sentence and have dispensed with the lumber of illustrative evidence. A great deal of effort would be spared on both sides if such were done. Yet it would be a pity, since it is in the marshalling of support that an author often first doubts his theory. In the absence of that doubt, there would be little value even for the idea that is initially so striking.

Dr. Eusden is such a doubter. His work began conventionally enough with a theory. His theory? "That influence and counterinfluence between Puritanism and common law could be readily established."[1] Common sense commended it. Everyone knew that many common lawyers had been Puritans, that they had contributed to the cause of Puritanism, that both groups had been of the middle class, that both had opposed much the same elements. Obviously ancient files were replete with scraps of paper that would sustain such a case. Dr. Eusden does not say when in his work doubt first was felt, but gradually his mind changed, and with it his theory. No longer was a simple cause and effect relationship what he sought to prove. In its place he had discovered a much more complex situation: namely, that Puritans and common lawyers had been of the same generation and had lived parallel lives. This, too, is common sense, but a sense partaking less of logic than of free thought association. Puritans and common lawyers had spent their times in quite complex living and not in forming units for ideational influence.

Since Max Weber laid it down as a sociological construct about half a century ago, everyone has known there is a Protestant Ethic.[2] The rise of Protestantism provided the "subjective factor" that produced the form of modern capitalism.[3] The glorification of work, the assurance of material rewards in this life for those who practice virtue, the rightness of income earned in trade and finance are all associated with this Protestant Ethic.[4] For many years it has not been possible for one writing in the area of religio-economic history to avoid using this highly provocative idea. Like most ideas, however, it is subject to abuse, particularly by those who seek to tidy up its edges. Weber, himself, was careful to point out the artifical nature of his constructs, that their only use was as a means of presenting types for examination in the rounds.[5] As such they were very neat but behind them was the mess from which they were drawn—"the total picture."[6] Like Ernst Troeltsch and Paul Tillich, Dr. Eusden wrestles with the relation of ideas to real things, the connecting of the constructs made neat for study with the formless background from whence they were drawn.[7] Perhaps it was here that he felt his first doubt as to the validity of his neat initial thesis.

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[1] p. vii.

[2] "Protestant asceticism [is] the foundation of modern vocational civilization—a sort of spiritualist' construction of the modern economy." From Max Weber: Essays in Sociology, H. H. Gerth and C. Wright Mills, eds. (1946), pp. 18-19 quoting, Max Weber, letter to Wilhelm Richert.

[3] Ibid. p. 447, n. 20, discussing the critique of Ephraim Fischoff.

One analogy, that may help to clarify the concept of a history of ideas, is the stratified layers with which the prehistorian works. When the bank is cut away, there will be cultures A., B., C., and D. Each may have developed from its predecessor in which case there will be a gradual change in artifacts. The standards of culture A will grow more and more scarce while the standards that identify culture B come to the fore. On the other hand the cultures may not be related. Culture B will then break off in fire and slaughter to be abruptly replaced by culture C on the smoothed over ruins. Or culture B may depart because of drought and culture C not arrive until the sands have blown across its predecessor's remains. But in any case the evidence stays, perhaps complicated by an upheaval of the earth thrusting culture B into culture C's level or an erosion that washes culture D into culture C. There it lies for the sorting. Ideas are much the same. In century after century there may come a gradual development in one area. Or there may be an incursion of ideas from elsewhere. There may come an upheaval thrusting the past forward or a flood of ideas reading their existence into the past. Early seventeenth-century England is such a stratified site and Dr. Eusden has tried to sort out part of it.

First, there is the gradual development of ideas in England itself. The concept of distributive authority is one the author finds particularly English. Medieval in origin, he finds it flourishing today.[8] Puritans and common lawyers alike worked upon it to produce the changes hat marked the idea's passage through the centuries. Foreign ideas, too, made their appearance. The Marian exiles brought back John Calvin's eligion[9] and William Prynne put forward a vigorous Erastianism in he Long Parliament.[10] Other disciplines, as well as other nations, made their invasions and science supplied ideas for the Puritan's purposes.[11] The past was brought forward, too, for the Puritans saw in he Stoics "the clear emphasis on God's rule and providence."[12] All of t was further complicated by later writers who threw back into the period ideas not then prevalent. The best example of that, perhaps, is he interpretation put upon Dr. Bonham's case. S. E. Thorne showed wenty years ago that all the court meant to say was that a party ought not to judge his own case. It was not a precedent for judicial review.[13] But, so holding, it was important in the nineteenth century and this is he sort of erosion that often occurs upon a century's ideas. Dr. Eusden is careful to identify all of the strata and assign origins for each.

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[4] R. H. Tawney, Religion and the Rise of Capitalism, (Rev. ed. 1937), pp. 15-16 found the same ideas held by Catholic theologians of the fourteenth and fifteenth centuries, Ibid. p. 259, note 7 quoting Nicholas Oresme, Bishop of Lisieux, Laurentius de Rodolfis, and St. Antonio, archbishop of Florence.

[5] "In order to make this attempt, the author must take the liberty of being 'unhistorical' in the sense that [matters] are presented systematically and essentially in greater unity than has ever been the case in the flux of their actual development . . . If it were done arbitrarily, this simplification would be a historical 'falsification.' This, however, is not the case, at least not intentionally." Gerth and Mills, *op. cit.* p. 294, reprinting Weber, "The Social Psychology of the World Religions: Introduction." (1913).

[6] Ibid.

[7] pp. 140-141, discussing Tillich's concept of "belief-ful realism." The reality to which ideas relate can also be other ideas.

[8] pp. 155-160.

Before it is possible to consider Puritans and common lawyers in early seventeenth-century England, it is necessary to consider what lay about and behind them. For instance, why discuss common lawyers or limit the discussion to them? There were others. There were the civilians, who practiced in the Court of Requests and in the manorial councils. University trained, favored by the crown and nobility, they had behind them the weight of the Roman law and the prejudice of the Renaissance. Then there were the canon lawyers who had the business of the ecclesiastical courts, and the proctors who handled the business of estates. There were the equity pleaders who practiced before the Court of Chancery and who were engaged in making up the rules of what constituted *ex aequo et bono*. What it was to be had not been determined prior to the late seventeenth century. Practice was as exciting to them as to any serjeant or king's counsel. There were those, too, who handled the business of the merchants before the lord admiral's court, the courts of the burgesses and the courts of the merchants themselves. When the seventeenth century began there was no reason to believe the practitioners in three courts – King's Bench, Common Pleas, and Exchequer – would put to rout the opposition. The evidence was all to the contrary. The Holy Roman Empire was in the process of receiving Roman law, while the Writers to the Signet in Scotland had been converted. But the common law had Coke; and he was to provide what the other systems lacked: a single-minded advocate. That alone was not the sole reason. Dr. Eusden makes that evident; and it was these other reasons which supplied the alliance between Puritans and common lawyers.

When Henry VIII rejected the Pope, Protestant theologians found a divine decree ordering final and complete obedience to the King.[14] By 1603, when James came to Henry's place, this view no longer interested Puritans.[15] But it interested others. Lord Verulam, in currying royal favor, pushed for the expansion of the chancery court. The civilians whose practice lay in the prerogative courts, also worked for a sole central authority. The canonists, whose courts were threatened in the execution of their judgments by the forces of the common law, appealed to the King. It would be puerile to emphasize personal advantage here as the decisive factor, although it would be equal folly to oust it from consideration. The discovery of political science by Jean Bodin[16] had stressed the role of a strong central authority to distribute power throughout the community. The logical minds of the Renaissance from Dante through Machiavelli to Erasmus adhered to the view of power at the center. The civilians, who saw themselves as that power's administrators, cannot be blamed for its advocacy. But the Puritans regarded it as a threat and rejected the theories of Bodin and his English followers.[17] The common law lawyers whose system was so unadaptable to a rationally organized state were also hostile, while the merchants desired only so much authority as would protect them in their enterprise.[18] An alliance might, therefore, not be unnatural.

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[9] p. 26, although the idea of "an all-embracing divine sovereignty" was also put forward by John Wyclif.

[10] p. 33. Most Puritans, however, rejected the idea of secular control of the church.

[11] p. 37.

[12] p. 27, citing Thomas Gataker's, "Introduction to the Maxim's of Marcus Aurelius."

[13] pp. 135-136, citing S. E. Thorne, "Dr. Bonham's Case," 54 Law Quarterly Review, No. 216 (Oct. 1938).

But it was not a matter of a coalition of coherent political units. The merchants had scarcely emerged from dependence upon the crown for their role in political affairs and the common law lawyers found it difficult to see where the interests of their profession lay. As for the Puritans, they were an amorphous group within the Anglican church.[19] Those who study the role of religious blocs so long view them as economic influences and social causes that they forget a religious bloc is created first from motives other than economic, social or political.[20] Dr. Eusden carefully avoids such an error in relation to the Puritans.[21] The Puritans wrestled first with problems of personal salvation and then with other matters when the content of their beliefs produced conflicts. They were hostile to general theorizations, for they clasped the Bible as their answer-book to all problems. As Stanislas Kot has pointed out, it is strange that those who most strictly invoked scripture were to exalt most the role of human reason[22] in priority to human emotion.[23] Such was the case, however, and here, too, they may have been a cause for sympathy between the *ration recta atque integra* of the theologians and the "artificial reason" of Coke.[24] It was as the King found them to be "pestes" and forbade them their mission of preaching that the Puritans turned toward other allies in what became their struggle.

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[14] p. 114, quoting William Tyndale, "The Obedience of a Christian Man" (1528).

[15] p. 73. They did not reject the supremacy of the crown in spiritual matters, but they attached qualifications to the king's power as governor of the church.

[16] p. 176. Bodin, of course, would have limited power at the center and this, perhaps, is his contribution.

[17] See note 8 supra.

[18] pp. 104-110 for a discussion of Bate's Case.

[19] pp. 15-16.

[20] Marxists, of course, deny this. Engels viewed the Reformation as a "bourgeois-plebian movement under a religious cloak." Frederick Engels, letter to Karl Kautsky, May 21, 1895, in D. Riazonov, Introduction (1925) to Engels' "The Peasant War in Germany," (Am. ed. 1926), p. 10.

[21] pp. 19-40, his discussion of "The Essential Calvinist Core."

[22] Stanislas Kot, "Socimanism in Poland," (Am. ed., Earl Morse Wilbur, 1957) p. xxiv.

[23] See Andre' Gide, Introduction (1947) to James Hogg, "Confessions of a Justified Sinner" (1924), where he remarks on what he calls "this monstrous fruit of the Tree of Knowledge," p. xi, in speaking of the Antinomians.

In speaking of Puritans, Dr. Eusden confines himself to a few divines and laymen who wrote extensively on theology. Naturally, this does not embrace the Puritan movement. So long as Puritanism remained within the Anglican church (and the Puritans detested the separating Congregationalists),[25] they had many allies.[26] To the sad fate of categorization, the confusion of labels in the period contributes a good deal. Dr. Eusden is careful to differentiate the various sorts of views held by persons called Puritan, but he holds them in low regard, as having little importance in the early seventeenth-century. The impact of Calvinist theology had a greater meaning than any question of temporal organization. Not until the Puritans had arrived at certain conclusions relating to salvation did they devote much energy to other matters. Discussions of free spech, religious liberty, Parliamentary supremacy, and related matters, considered by subsequent generations to originate with Puritan thinking, were all the result of the conflicts following the convening of the Long Parliament. In the demands that preceded that period, Dr. Eusden found little to forecast what the future would bring.[27] Despising broad theoretical declarations, accustomed to moving from scriptural verse to scriptural verse in the assembling of arguments, the Puritans waited until circumstances presented them with experiences from which a particular solution might be wrung. Only later, in retrospect, was it seen that a theory of liberty had been set forth, act by act.[28]

But, why should the particular acts have taken this form? Partly, it may have been due to the something less than victory won by the Puritans. In the flush of conquest, there were not lacking those who declared for an absolutist state.[29] Even then, there had been those who opposed such a constitution for the state — groups and men as diverse as the Levellers[30] and John Milton. But after 1660 there was a necessity to reach a *modus vivendi* with the Anglican majority and a necessity for the latter also to come to terms.[31] The fact that they were not too far apart at any time during the seventeenth-century greatly facilitated this compromise, even though it had to be reached over the body of the

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[24] pp. 133-135.

[25] p. 15. "With Ramist logic and strained casuistry, the Independents called for an established church and yet insisted on the autonomy of the local parish," p.14.

[26] Dr. Eusden finds much sympathy between Richard Hooker, the Anglican spokesman, and the Puritans, pp. 16-17.

[27] p. 154.

[28] Dr. Eusden sees John Locke in the role of this post-natal summarizer, p. 177, n. 11.

[29] p. 148 citing John Pym and Oliver Cromwell.

[30] p.55. Despite the economic and social radicalism of this group, it put most stress upon individual freedom.

[31] p. 161. "When James II refused to acknowledge the shift of authority from Crown to Commons, it was a relatively simple matter in 1688 to impress parliamentary supremacy upon that grandson of the first Stuart."

House of Stuart.[32] Dr. Eusden finds at this point that a cultural phenomenon in the realm of ideas assisted along the course of the adjustment. The phenomenon was the theory of independent institutions — "a decentralized, distributive, nonmonistic concept of sovereignty."[33] In the middle ages society was highly pluralistic. There were the various institutions of the church, of royalty, of feudalism, of the universities, of customary law; and not one of these formed in itself a rationalized unit. The king or emperor might stand at the head of feudal society, the pope at the head of the church; but their day to day powers were very tenuous. The monasteries, the mendicant friars, the diocesan clergy were all autonomous institutions owing the sketchiest submission to formal superiors. An archdeacon who secured the jurisdiction over a testate's estate, could defend that jurisdiction successfully against his bishop, his archbishop, or the Papal Curia itself. It requires no elaboration to state the lowly degree of control the king had over burgage or manorial courts. Society was built out of separate pieces and no one piece was absolute or even a source of lawful change. This was the inheritance of all western Europe, but only in England was it successfully utilized on any extensive scale to form a state exercising power short of the absolute.[34] The roles of the Puritans and the common lawyers were important in achieving this end.

Much fun has been had because Coke was an antiquary, because he was a medievalist,[35] because he was taken in by the thirteenth-century jest perpetrated by Andrew Horn.[36] But without these medieval qualities he could never have formulated a defensible organization of the common law nor resisted the agitators for an absolutist society. With all due regard to the universal genius of Francis Bacon and with due regard for the parochial qualities of Edward Coke, it is most fortunate the latter put the former to political rout. Even the primitive view of law held by Coke — that courts do not make the law but only discover it[37] — was a useful means of dispensing power at the source and disarming the otherwise most powerful at first instance. Coke might have had trouble agreeing with the justification for his work provided by Harold J. Laski or F. W. Maitland,[38] but he had no doubt as to its inherent rightness. Nor did the Puritans, who found this agreeable both to their federal theory of theology[39] and to the objective circumstances in which they found themselves. Each had strong motives to subscribe to such a view and each had the predisposition of themselves and those about them in their culture to incline them to this outlook. Subsequent history has shown, in addition, that there was considerable merit in the position. In an age of monistic societies, a theory of Pluralist living holds much attraction. Our pundits are engaged in much the same discussion when they speak of the closed versus the open society today.[40]

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[32] Ibid. At no time were the proponents of divine right absolutist monarchy many in number. The support for the Stuarts came from other sources and, as the fate of the Stuarts indicated, had other goals than absolute power for the royal house.

[33] p. 175.

[34] It is an exaggeration to say this; but certainly the theory of the civil law, completely triumphant on the continent, is based upon a monist view of the state, if not of society.

[35] p. 156.

[36] p. 117, n. 6.

[37] p. 159. This is the distinction between the *jus dicere* and the *jus dare*.

[38] p.175, citing the "out-and-out pluralism" of Laski and the " 'group personality' of institutions and associations" of Maitland and Otto Fvon Gierke.

[39] This is not to say the theology originated in legal theory or vice versa. Dr. Eusden is careful to show that the idea of a covenant in Puritan theology is not sprung from the common law. At best the theologians took up a convenient word, but they gave it an utterly unlegal content. pp. 29-30.

Nothing Dr. Eusden has to say indicates any simple organization of materials. He chose to write upon two groups in early seventeenth-century England and their influence on each other's and the day's politics. The common lawyers were a tiny group confined to those admitted to the inns of court; but their influence far transcended their numbers. When they brought pressure to bear politically, it was not in a royal court whose decline was upon it, but in a legislature whose greatness lay before it.[41] The Puritans also went to Parliament when hope of royal favor failed. They also were a minority, although a more important one. With the common lawyers, they exerted a powerful influence on the course of English politics. But it was no formal alliance; there was no plan of campaign; and there was no over-all objective toward which they strived. To speak of independent institutions, distributive justice, a pluralist society, is to endow past events with a later theory. The common lawyers wanted only to fend off competitors,[42] while Puritans desired only to prepare their souls for the New Jerusalem. But others had different ideas; and it was from the conflict that a libertarian theory of government was born.[43] Dr. Eusden asks the question, "Might it not be that the roots of political ideas are the intrinsic concerns and beliefs of particular groups who have been cast into the political arena?" He replies to himself by saying, "If so, a study of these groups and their conflicts is perhaps more important for the student of politics than the study of the great political philosophers who often are outside the arena."[44] His answer has to be tentative, for he must leave room for the effect of a philosopher such as Jeremy Bentham, whose work reshaped so much of the impress made by Puritans and common lawyers.[45] But it has a ring of truth to it even so. And it is not simple.

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[40] Dr. Eusden in his extensive bibliography, pp. 181-221, indicates not merely seventeenth century sources of such ideas, but also contemporary, and controversial, ideologues. The bibliography contains a convenient table of contents, p. 181, and useful comments on his bibliographical aids, pp. 182-184, and on the early seventeenth-century materials used, pp. 184-199.

[41] Coke's own successful career at the royal court indicates this was not due to preference but to the fact that what Coke desired to push, the monarchy was not interested in receiving. Parliamentary service against the crown was a late part of Coke's career.

[42] pp. 89-94 on the writs of prohibition.

[43] The highly competitive economic system lying behind the social and political results may well have been of greater importance for the existence of a plural society. Willard Hurst, "Law and the Conditions of Freedom" (1956), p. 6. Space limitations probably prevented Dr. Eusden from dealing with this, p. 177.

[44] pp. 178-179.

[45] pp. 162-163. "Every major reform in English law during the nineteenth century can be traced in part to the influence of the Benthamites." It was the thesis of a paper read by Stefan Riesenfeld at the Round Table on Legal History, December 29, 1957, at the meeting of the Association of American Law Schools, that many

Perhaps that is the most important point in Dr. Eusden's book. No part of the past can be made to conform to some single theory without doing the facts an injury. The explanation of a Puritan-common lawyer contribution upon a scheme of distributive justice is very ingenious, very helpful, and probably very true. But the trifling mentions made of Oliver Cromwell by Dr. Eusden[46] and the "foreboding . . . of common's demise, as some claim, in the suffocating clutches of administrative law"[47] indicate that this does not summarize all the truth. We know of our own day how complicated it is. If any of us were asked to write a history of the recent Jenner bill to limit the appellate jurisdiction of the United States Supreme Court, we would feel ill-used if expected to produce a simple account, setting forth transparent motives, and concluding with a theory explaining the pros and cons. But that is an easy task compared to the goal most historians set for themselves. To succeed in any degree is no small accomplishment. Dr. Eusden enjoys such a success in this book. His style is easy, his wit peeps through, his scholarship is worn without strain.[48] It is a book to read for pleasure, yet what it says cannot be legally put aside. What it says is provocative and what it does not say is a stimulator for thoughts as well. Anyone interested in the relation of pressure groups to law, power and ethics must find it interesting. As Dr. Eusden says when he puts Thucydides with Plato, "The stuff of political history comes in the main from the ideas of essentially nonpolitical groups who contend with the powers that be."[49] If the words "and individuals" are added after "groups," it would cover the field. Still, no one ought to be too dogmatic about it.[50] The past, like our present, defies easy analysis.

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of these nineteenth century reforms had already appeared in the American colonies prior to 1700.

[46] p. 1 speaks of "the glorious age of John Pym, John Lilburne, Henry Ireton, Oliver Cromwell, and John Milton." Shades of Thomas Carlyle who exalted his Cromwell above "the Talking-Apparatus", the House of Commons. See Thomas Carlyle, ed., Letters and Speeches of Oliver Cromwell (1890), vol. 5, p. 131, "Elucidation" to Cromwell, speech dissolving Parliament, February 4, 1957-8.

[47] p. 149.

[48] The fact that he is assistant professor of religion at Yale University Divinity School is revealed in his personal comment on those who equate fundamental law with God: "To this the author would reply: Nothing can be God except God, not even fundamental law." p. 125, n. 25. The pastor will reveal himself!

[49] p. 179.

[50] Such a definition would, after all, exclude all the authors of "The Federalist" and Thomas Jefferson. As a meaningful statement it probably has greatest relevance to the period preceding the organization of political parties.

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AMENDMENTS TO THE WORKMEN'S COMPENSATION ACT 1956-1958

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Several changes of importance were made in the Mississippi Workmen's Compensation Act by the Mississippi Legislature during its 1956 and 1958 Sessions.[1] Some of the changes came about as a result of Supreme Court opinions interpreting the Act. Other changes resulted from the changing industrial picture in Mississippi and the improvement in the economic standards of its citizens. Other changes were administrative in nature and have no legal effect upon the benefits provided in the Act. However, all in all, the amendments have been designed to liberalize and clarify the Act, and to improve its administration, rather than to basically change it. But, in so doing, some effort was made to provide industry with relief in cases wherein pre-existing disabilities and conditions of the employee was a factor. The purpose of this article is to point out each of these amendments and to discuss their effect.

A. THE 1956 AMENDMENTS

1. *Highway Safety Patrol Employees*

City, County, District, and State public employees have been eligible for workmen's compensation benefits in Mississippi since 1950.[2] However, it has not been mandatory that public employees be provided with such coverage; and many departments and public officials have not elected to provide such coverage for their employees. Moreover, when such coverage is voluntarily provided, the Act provides that the premium therefor must be paid as follows: 75% from appropriated or other funds, and 25% must be paid by the public employees who are beneficiaries under the policy. However, effective July 1, 1956, an exception was made in the case of public employees who are patrolmen or other personnel of the Mississippi Department of Public Safety. It is now mandatory that workmen's compensation coverage be provided for their protection by the Department of Public Safety, and the entire premium is paid by the Department of Public Safety. Therefore, patrolmen and other personnel of the Department of Public Safety are the only public employees in the State of Mississippi who are *guaranteed* the same rights and privileges under the Workmen's Compensation Act as are private employees; and, further, they are the only public employees who receive such benefits without having to contribute to the premium cost thereof. This was accomplished indirectly by an Amendment to the "Highway Safety Patrol and Driver's License Act of 1938," rather than by amending the Workmen's Compensation Act—the pertinent part of the amendment reading as follows:

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[1] 1956. S. B. 1757, Regular Session 1956; S. B. 1835, Regular Session 1956; S. B. 1888, Regular Session 1956; Miss. Laws 1956, c. 344, 345, 377.

1958. H. B. 610, Regular Session 1958; H. B. 480, Regular Session 1958.

[2] H. B. 433, Regular Session 1950; Miss. Laws 1950, c. 412 § 2; Miss. Code Ann. § 6998-03.

> "The Department of Public Safety shall purchase Workmen's Compensation Insurance with coverage for all patrolmen and other personnel employed by the Commission, as authorized by law, and all personnel shall be entitled to the benefits prescribed by Chapter 354, Laws of 1948, as the same is now or may hereafter be amended, cited as the 'Workmen's Compensation Law'."[3]

2. *Newsboys, et al.*

The major amendment to the Act during the 1956 Session of the State Legislature was the result of the 5 to 4 decision of the Mississippi Supreme Court on June 13, 1955, holding that "newsboys" were "employees" within the meaning of the Act, and, therefore, subject to its benefits.[4] Effective April 6, 1956, the Act was amended to exclude from its provisions "all independent contractors, and especially any individual performing service in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement by which the newspapers or magazines are to be sold by the individual at a fixed price, the individual's compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to the individual, whether or not the individual is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines returned."[5] The obvious purpose of this amendment is to do nothing more than to expressly exclude newsboys and magazine salesmen from the benefits and provisions of the Act, unless they are operating under an arrangement substantially different from that set forth in the statute.

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[3] S. B. 1888, Regular Session 1956; Miss. Laws 1956, c. 377 § 2; Miss. Code Ann. § 8085 (1942).

[4] Laurel Daily Leader, Inc. v. James, 224 Miss. 654; 80 So.2d 770 (1955).

[5] S.B. 1757, Regular Session 1956; Miss. Laws 1956, c. 344; Miss. Code Ann. § 6998-02 (1942).

In summary, this amendment provides that individuals who are "newsboys" or "magazine salesmen" are not "employees" and are expressly excluded from the provisions and benefits of the Act if he or she is selling such newspapers or magazines under an arrangement where (1) the newspapers or magazines are sold by the individual to ultimate consumers at a fixed price, and (2) the compensation is in the form of the difference between the sales price and the amount charged the individual. The amendment further provided that the exclusion is not defeated by reason of the fact that the individual is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with unsold newspapers or magazines returned.

By this amendment Mississippi has joined many other states who have found it necessary to solve the problem of "newsboys" status by statute.[6] But most of the statutes have been for the purpose of *including* rather than *excluding* the "newboys." In fact New Jersey was one of the few states that had a statute expressly excluding them, and in 1955 in an opinion written by Chief Justice Arthur Vanderbilt, the Supreme Court of New Jersey ruled that such an exclusion was unconstitutional because it denied the claimant the "equal protection of the law" in that the purported classification was unreasonable, unreal and arbitrary.[7] However, it is submitted that by this amendment, the legislature has clearly stated that it never intended for "newsboys" to be included within the definition of the term "employees" as used in the Act.

3. *Administrative Changes*

The only remaining changes made in the Act during 1956 were administrative in nature.[8] Since the Second Injury Fund was not accumulating sufficiently, its provisions were changed to provide that "in every case of compensable death of an employee under this act, the employer shall pay to the Commission the sum of $150.00 except in cases where there is no dependency, then there shall be paid to the Commission the sum of $500 to be deposited with the State Treasurer for the benefit of said fund, and the Commission shall direct the distribution thereof."[9] Previously, payments were made into the Second Injury Fund in the sum of $500.00, but only in case of a compensable death where there was no dependency.[10]

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[6] Larson, Workmen's Compensation, §49.22.

[7] De Monaco v. Renton, 113 A.2d 782 (N.J. 1955). (However in Statham v. Blaine, 107 So.2d 93 (Miss. 1958); and in Richards v. Blaine, 107 So.2d 101 (Miss. 1958), the Mississippi Supreme Court has ruled that the statute, as amended, excludes from the provisions of the Mississippi Workmen's Compensation Act "magazine salesmen" employed under an arrangement as set out in the amended statute).

zine salesmen" employed under an arrangement as set out in the amended statute.

[9] Miss. Laws 1946, c. 345, § 1; Miss. Code Ann. § 6998-37 (1942).

[10] Miss. Laws 1948, c. 345, § 31; Miss. Code Ann. § 6998-37 (1942).

The annual salary of the Chairman of the Commission was increased from $7,500.00 to $8,500.00; and the annual salary of the two remaining Commissioners was increased from $7,000.00 to $8,000.00. The annual salary of the Secretary of the Commission was increased from $5,000.00 to $6,000.00. The annual salary of the Attorney-Referees was increased from $6,000.00 to $7,200.00, provided that they have had five or more years experience as practicing attorneys in Mississippi. For those Attorney-Referees with less than the stated five years experience (and the Commission does not have any on its staff), the annual salary was increased from $5,000.00 to $6,000.00.[11] In addition, the Commission was authorized to increase the number of Attorney-Referees on its staff from two to three, which it has done.[12]

B. 1958 AMENDMENTS

1. *Proration of Aggravated Pre-existing Conditions or Disabilities*

The most important amendment to the Act during the 1958 Session of the State Legislature was the one providing, under certain circumstances, for the proration of compensation benefits payable to an injured worker or his dependents as a result of disability arising from the aggravation, acceleration or adverse affect by accidental injury of a pre-existing physical handicap, disease or lesion had by the employee. This particular amendment reads as follows:

> "Where a pre-existing physical handicap, disease or lesion is aggravated, accelerated or adversely affected by accidental injury, or is in any manner a material contributing factor in the results following accidental injury, the compensation which, but for this paragraph, would be payable shall be reduced by that proportion which such pre-existing physical handicap, disease or lesion, contributed to the production of the results following the accidental injury. Provided, however, this section shall only apply in those cases wherein the employer, in advance of any subsequent injury, has required a pre-employment physical examination, and such examination has disclosed a pre-existing permanent physical impairment, based on satisfactory medical evidence of such impairment, and such pre-existing physical handicap disclosed was materially aggravated by the subsequent injury."[13]

Prior to this amendment's adoption, an employer was liable to his injured employee in full for the resulting disability where a pre-existing physical handicap, disease or lesion was aggravated, accelerated or adversely affected by the accidental injury arising out of and in the course of the employment.[14] It was argued that such a situation placed too great a potential liability upon the employer; and that, as a result, many handicapped workers were being dismissed and were finding it more and more difficult to obtain other employment. It was in an effort to remedy this situation that this amendment was passed by the legislature. That is why it provides the proration will only apply in those cases where the employer had required, before employment or in advance of the injury for which compensation is sought, a pre-employment physical examination which reflected the extent of the pre-existing disability, and that the subsequent injury materially aggravated the prior disability. Thus it provides, in summary, that if an employer hires a handicapped person knowing full well that he is a handicapped person and the nature and extent of his disability, then the employer would only be liable for the increase in degree of disability; *but,* if an employer hires an employee without making competent inquiry into the physical condition of the employee at the time of hiring (indicating thereby that the employee was hired without regard to his physical condition), then the employer takes the employee as is, and he cannot later be heard to complain if he must bear full responsibility as a result of the aggravation of the pre-existing disability or condition. In other words, the legislature desired to give the employer a break, but only if he gave a handicapped worker a break—with full knowledge that he was a handicapped worker. It was not the intention of this provision to open the gates for a belated sweeping inquiry into the medical history of an employee whenever he or she made a claim for compensation benefits.

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[11] Miss. Laws 1956, c. 345, § 2; Miss. Code Ann. § 6998-43 (1942).
[12] Miss. Laws 1956, c. 345, § 3; Miss. Code Ann. § 6998-44 (1942).
[13] H.B. 610, § 1, Regular Session 1958; Miss. Code Ann. § 6998-04 (1942).

Taking a closer look at the amendment, it is obvious that the proration applies only to the "compensation" benefits and not the "medical" benefits provided by the Act, as it specifically provides only that ". . . the compensation which, but for this paragraph, would be payable shall be reduced . . . ." The Act defines "compensation" as the money allowance payable to an injured worker or his dependents as provided for in this Act, and includes funeral benefits provided therein.[15] "Medical services and supplies" are provided for separately in the Act,[16] and are treated as a separate item in the administration of the Act, and are not, therefore, subject to proration under the provisions of this amendment. Moreover, the provisions of this amendment apply only in those individual cases wherein the employer (1) in advance of any subsequent injury, (2) has required a pre-employment physical examination, and (3) such examination has disclosed a pre-existing permanent physical impairment, (4) based upon satisfactory medical evidence of such impairment, and (5) such pre-existing physical handicap disclosed was materially aggravated by the subsequent injury. The burden of proof is upon the employer and his insurance carrier to show that they have complied with all the provisions of this amendment and are thereby entitled to the benefit of proration in any particular case. Unless they can prove that all the requirements of this amendment have been met, then the case will not be affected by it, and they will be liable in full for any resulting disability.

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[14] Miss. Products Co. v. Gordy, 224 Miss. 690, 80 So.2d 793 (1955).
[15] Miss. Code Ann. § 6998-02 (10) (1942).
[16] Miss. Code Ann. § 6998-08 (1942).

By the introduction of the concept of proration of compensation benefits into our Act, even though it is limited to certain circumstances, we have made the only major basic change in our Act since its adoption in 1948. The long-range effect of this amendment and this concept cannot be fully realized until our Courts have had an opportunity to provide a judicial determination of the questions that will undoubtedly arise.

2. *Permanent Partial Disability — Scheduled Injuries*

Our Supreme Court ruled in 1957 that the loss of an employee's testicles, or any one of them, as a result of a work-incurred injury, does not, in and of itself, entitle him to compensation benefits for any permanent disability.[17] The Act was amended to provide such an employee some relief.[18] Now, the loss of one (1) testicle entitles the employee to compensation benefits for 50 weeks permanent partial disability, and the loss of both testicles entitles him to compensation benefits for 150 weeks. And, in the same amendment, it is provided that a female employee who loses one (1) breast shall be entitled to compensation benefits for 50 weeks permanent partial disability, and the loss of both breasts by the female employee shall entitle her to compensation benefits for 150 weeks permanent partial disability. In the process of amendment, the sub-sections of the statute concerning "permanent partial disability" were renumbered. In all fairness to our Supreme Court, however, it must be pointed out that the universal rule is in keeping with their decision, premises considered; and the only exception to such rule is in those cases wherein the statute clearly authorizes an award.[19] The Mississippi Statute now clearly authorizes an award in such cases; but it did not do so at the time the question was presented to our Supreme Court.

3. *Subcontractors*

A subcontractor is one who enters into a contract, express or implied, for performance of an act with a person who has already contracted for its performance, or who takes a portion of a contract from the principal or prime contractor. All subcontractors are independent contractors, but an independent contractor is not necessarily a subcontractor within the commonly understood meaning of the term.[20] For example, a relation of prime contractor and subcontractor exists where a house contractor sublets a portion of the contract work to another.

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[17] Jones v. Mason and Dulion Co., 91 So.2d 715 (Miss. 1957).
[18] H.B. 610, § 3, Regular Session 1958; Miss. Code Ann. § 6998-09 (1942).
[19] Larson, Workmen's Compensation, §§ 65.20, 65.30.

From January 1, 1949, until April 6, 1950, the pertinent provisions of our Act concerning subcontractors read as follows:

> "In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment."[21]

In its 1950 session the legislature amended this provision by adding the following sentence to the end of the foregoing quoted statute: "In such cases the number of employees of the subcontractor shall be the factor determining liability."[22]

However, the 1950 amendment was repealed by the 1958 session of the legislature, and the statute, effective January 1, 1959, has been restored to its original provisions.[23]

This portion of the Act was amended in 1950 because the original statute was thought to be ambigious in that it was not clear whether the prime contractor would be liable for the employee of a subcontractor if either the prime contractor or the subcontractor had too few employees to come within the compulsory provisions of the Act. At the time of the 1950 amendment, the question had not been presented to the courts for decision. At that time contractors were concerned over having to pay for insurance coverage which they might not need; and the insurance companies were concerned over whether they might be held legally liable by having their insurance policy construed to cover a situation for which they had received no premium.[24] However, the original statute was subsequently construed by our Supreme Court and the apparent ambiguity was resolved.[25] Later, our Supreme Court construed the statute as amended in 1950.[26]

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[20] See 40 Words & Phrases 340.

[21] Miss. Laws 1948, c. 354, § 4; Miss. Code Ann. § 6998-04 (1942).

[22] Miss. Laws 1950, c. 412, § 3; Miss. Code Ann. § 6998-04 (1942).

[23] H.B. 610, Regular Session 1958, § 1; Miss. Code Ann. § 6998-04 (1942).

[24] Shanahan, Recent Amendments to the Mississippi Workmen's Compensation Act, 22 Miss. L.J. 25, at page 26 (1950); Winter, The Work of the 1950 Session of the Mississippi Legislature, 22 Miss. L.J. 1, at pages 12, 13 (1950).

[25] Mills v. Barrett, 213 Miss. 171, 56 So.2d 485 (1952).

[26] Jackson v. Fly, 215 Miss. 303, 60 So.2d 782 (1952); Mosley v. Jones, 224 Miss. 725, 80 So.2d 819 (1955).

Reading the 1958 amendment in connection with these cases interpreting the statute, it is now clear that effective January 1, 1959, a prime contractor will be liable for workmen's compensation coverage for the employees of a subcontractor unless the subcontractor provides such coverage. This liability will attach should either the prime contractor *or* the subcontractor have in his employ eight or more workmen or operatives, regardless of the number of such employees that might be working on the particular job where the accident occurs. For example: A, the prime contractor, has 15 employees scattered over several jobs. B, the subcontractor, has 5 employees scattered over several jobs. C, an employee of B, is injured on a job which B has subcontracted from A. D, an employee of A, is injured on the same job as a result of the same accident. Under the statute as amended in 1950, if the subcontractor, B, did not voluntarily provide workmen's compensation coverage for his employees, then C would receive no benefits as a result of his injury, but D would. Under the statute as originally written and again as amended in 1958, both C and D will be entitled to workmen's compensation benefits as a result of the accident, and if the subcontractor, B, does not provide the coverage, then C can hold the prime contractor, A, liable therefor. The 1958 amendment prohibits a situation arising in which a sort of class distinction is drawn among employees working on the same job just because they happen to be working for different employers. Now, all employees on a given job are afforded workmen's compensation benefits, or none of them are entitled to such benefits.

4. *Compensation Benefits*

Prior to the 1958 amendment, compensation benefits payable to the injured employee or his dependents could not exceed $25.00 per week, nor be less than $10.00 per week, except in partial dependency cases.[27] The amount of the weekly compensation benefit payable to an injured employee, of course, was arrived at by taking 2/3 of the average weekly wage of the employee.[28] In the case of death benefits the percentage varied, depending upon the status of the dependent and the nature of the dependency.[29] Maximum compensation benefits payable to an employee for an injury, or to his dependents as a result of his death, was $8,600.00 or 450 weeks, whichever was the lesser.[30] Effective January 1, 1959, the maximum weekly compensation benefit will be $35.00, and the maximum compensation benefits payable to an employee as a result of an injury will be $12,500.00 or 450 weeks, whichever is the lesser. Death benefits were changed accordingly.[31]

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[27] Miss. Laws 1950. c. 412, § 4; Miss. Code Ann. § 6998-07 (1942).
[28] Miss. Laws 1950, c. 412, § 6; Miss. Code Ann. § 6998-09 (1942).
[29] Miss. Laws 1950, c. 412, § 7; Miss. Code Ann. § 6998-13 (1942).
[30] Ibid, footnote 28 and 29.

This change was made necessary because of the improving economic standards of the average Mississippi citizen and the rising cost of living. Under the original statute, anyone making $37.50 or more per week was held to a maximum weekly benefit of $25.00. In view of the present Federal minimum wage of $1.00 per hour, (and a 40 hour work week, plus overtime), it is obvious that such a weekly maximum was unrealistic. Under the amendment anyone making $52.50 or more per week is subject to the maximum benefit of $35.00. The effect of the amendment is to aid those employees making more than $37.50 per week; and to provide a graduated scale of weekly benefits for those making between $37.50 and $52.50 per week. Generally, anyone whose average weekly wage is $30.00, or less, will not receive any benefit from the increase. At $30.00 per week, the employee's weekly compensation benefit would remain only $20.00; and even if he should be entitled to compensation for the full period of 450 weeks, he would only receive a total of $9,000.00. The effect of the increase will only be realized by those employees in the higher wage bracket.

There is another reason for the increase in compensation benefits for the higher salaried employees. The premium for workmen's compensation insurance is a product of the rate times the payroll. Therefore, the more an employer pays in total wages the more his workmen's compensation coverage costs him. Let us illustrate. Suppose that the workers in a specific industry have been receiving an average weekly wage of $40.00, and there was an increase of an average weekly wage to $50.00. The Workmen's Compensation rates would not change as a result of this increase, but the insurance company carrying the workers in this particular industry automatically receives an increase in premium income of 25%. However, there would have been no corresponding increase in the benefits that must be paid by the insurance company to the injured workers, since in the benefit calculation 2/3 times the original average weekly wage ($40.00) produced a result above the maximum effective benefit in Mississippi of $25.00 per week. It can be clearly seen that solely because the employer is paying higher wages to his employees, the insurance company is enabled to achieve an increase in premium revenue with no increase in rate and no corresponding increase in benefits or liability. It is understandable, therefore, that the employers of Mississippi have been complaining in regard to the increasing cost of workmen's compensation coverage. For, as the wage earning capacity of the citizens of Mississippi increased, the premium for workmen's compensation coverage increased; *but,* for the higher salaried employees the increase in premium did not bring with it any corresponding increase in benefits. The 1958 amendment tends to alleviate this situation to some degree; and, under it, for the employer of the employees contained in the foregoing illustration, an increase in weekly wages would result in an increase of premium, but the increased premium would purchase an increase in benefits for his employees.

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[31] H.B. 610, §§ 2, 3, 4, Regular Session 1958; Miss. Code Ann. § 6998-07 (1942); Miss. Code Ann. § 5998-09 (1942); Miss. Code Ann. 6998-13 (1942).

5. *Administrative Changes*

The remaining direct changes made in the Act during 1958 were administrative in nature. The annual salary paid to the Commissioners, the Chairman, the Secretary of the Commission, and the Attorney-Referees was increased. The only change of note is that all Attorney-Referees now are receiving the same annual salary; whereas, previously, one annual salary was provided by statute for those with less than five years experience as a practicing attorney and another annual salary was provided for those with more than five years experience. As the Mississippi Workmen's Compensation Commission has never had an Attorney-Referee with less than five years experience as a practicing attorney, the distinction served no purpose. These administrative changes became effective July 1, 1958.[32] All other amendments to the Act became effective January 1, 1959.[33]

C. ILLEGALLY EMPLOYED MINORS

An employee within the provisions of the Act includes a minor unlawfully employed.[34] But compensation and death benefits are doubled if the employee, at the time of injury, is under 18 years of age is employed, permitted or suffered to work in violation of any provision of the Mississippi labor laws. The employer alone, and not the insurance carrier, is liable for such increased compensation benefits, and any provisions of an insurance policy undertaking to relieve him from such increased liability is declared to be void.[35] The Mississippi Workmen's Compensation Commission has further amplified the statute in its rules and regulations.[36] These rules and regulations and the legislative history of this statute make it clear that the "Mississippi labor laws" referred to therein are solely those enacted by the Mississippi legislature, and none of the Federal labor laws are included within its meaning.[37]

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[32] H.B. 480, Regular Session 1958; Miss. Code Ann. § 6998-43 (1942).

[33] H.B. 610, Regular Session 1958.

[34] Miss. Code Ann. § 6998-02 (4) (1942).

[35] Miss. Code Ann. § 6998-54 (1942).

[36] MWCC Rule No. 11 provides that the "Mississippi labor law" referred to in the Act is Sections 6985-6994, inclusive, Miss. Code Ann. (1942).

[37] As originally written the statute applied to ". . . work in violation of any provision of the labor laws." Miss. Laws 1948, c. 354 § 48, Miss. Code Ann. § 6998-54

Violations of the "Mississippi labor law" include: (1) employment of a boy or girl under the age of 14 in any mill, cannery (except fruit and vegetable canneries),[38] workshop, factory or manufacturing establishment;[39] (2) working minors, boys or girls over 14 and under 16, in excess of prescribed hours in any such business;[40] (3) working minors or others, over 16 years of age, in excess of prescribed hours in any such business;[41] (4) employment of any child in any such business who is over 14 and under 16 years of age, and who is not complying with the compulsory school attendance law;[42] and (5) employment of any female more than ten hours a day or more than sixty hours a week in any type of work except domestic work.[43]

Both the provision in the Workmen's Compensation Act concerning minors illegally employed and the "Mississippi labor law" remain as a part of our statutes without direct amendment. However, the 1956 session of the State legislature repealed the "Compulsory School Attendance Law," except for Section 6511, Miss. Code Ann. 1942, which grants the board of supervisors of each county in Mississippi the authority to provide books for needy children.[44] Its repeal was believed necessary in order to enable Mississippi to more effectively fight to maintain segregation in our public school system—and the recent decisions affecting the State of Virginia on this subject indicate its repeal was warranted. However, as can be readily seen, the repeal of our "Compulsory School Attendance Law" has had the unexpected and indirect effect of affecting our child labor laws and the benefits provided in our Workmen's Compensation Act for minors illegally employed.

Our labor laws are apparently still in effect insofar as they concern any child under 14 years of age or any female who is worked more than the prescribed number of hours per day or week. However, when the "Compulsory School Attendance Law" was repealed, for all practical purposes, that portion of our child labor law concerning minors over 14

(1942). In 1950 this was amended to read ". . . work in violation of any provision of the Mississippi labor laws." Miss. Laws 1950, c. 412 § 21; Miss. Code Ann. § 6998-54 (1942).

[38] Miss. Code Ann. § 6992 (1942).

[39] Miss. Code Ann. § 6985 (1942).

[40] Miss. Code Ann. § 6986 (1942). Maximum hours are 8 hours a day and 44 hours a week. Hours excluded from lawful employment are those between 7:00 P. M. and 6:00 A. M.

[41] Miss. Code Ann. § 6986 (1942). Maximum hours in this category are 10 hours a day, except in cases of emergency or where the public necessity requires; and 60 hours a week. Certain variations are allowed.

[42] Miss. Code Ann. § 6987 (1942). The employer is required to secure an affidavit of compliance from the parents or guardian or school officials.

[43] Miss. Code Ann. § 6993 (1942). This section has no age limit and is not restricted to so-called hazardous occupations. Maximum hours in this category are 10 hours a day, except in cases of emergency or where public necessity requires; and 60 hours a week.

[44] Miss. Laws 1956, c. 288, effective February 24, 1956, repeals §§ 6509, 6510 and 6512 - 6517, inclusive Miss. Code Ann. (1942).

years of age was made unenforceable. This is because the pertinent part of the statute provides that such minors cannot be worked in such business " . . . unless such child has complied with, or is complying with, the compulsory school attendance law . . . ."[45] It is submitted, therefore, that no minor over 14 years of age can be illegally employed in Mississippi—unless such minor is worked more than the statutory prescribed number of hours per day or week. As a result, that portion of our Workmen's Compensation Act providing double benefits for minors illegally employed has, for all practical purposes, been made a nullity—except as concerns minors less than 14 years of age. Undoubtedly, the damage unintentionally done to the Mississippi Child Labor Laws as a result of the repeal of the "Compulsory School Attendance Law" should be corrected at the next regular session of our state legislature.

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[45] Miss. Code Ann. § 6987 (1942).

FEDERAL ANTI-TRUST LAWS AND THE MISSISSIPPI LAWYER

*Earl T. Thomas**

It has been said, "A lawyer's advice is his stock in trade." Within the past decade or so, events have transpired, and continue to transpire with increasing tempo, to demand that the Mississippi lawyer add to, or increase, his "stock in trade," namely, by adding to or increasing a working knowledge of the Federal antitrust laws.

To meet the demands or cope with the problems of his clients, the practitioner no longer can get by with his full stock being encompassed within the four corners of his "show window;" he must have a working supply also on the shelf, or more properly, on the "shelves," so variegated are the different and changing aspects of the various antitrust statutes as they apply to the various facets of a client's business.

Mississippi is no longer a State with a rural economy, or more narrowly, with a one-crop economy. With vision and vigor, our State, under progressive leadership, is "balancing agriculture with industry," diversifying its agricultural and forestry pursuits, establishing distribution and branch outlets, and witnessing and abetting not a mere evolution, but a virtual revolution in its economy. Such progress, significantly contributing to and being promotive of the free flow of goods in commerce, has suddenly but surely placed antitrust problems on the doorsteps of the Mississippi lawyer.

For members of our profession in this State supinely or smugly to say, "It can't happen here," is simply to ignore realities. Mississippi is no longer ignored as a forum for antitrust litigation, either by the public avengers – the Department of Justice[1] and Federal Trade Commission[2]—or by private suitors,[3] in treble damage actions.

The advocate or trial lawyer is not the one solely concerned with antitrust law. As a matter of fact, the counsellor[4] should be, and generally is, more vitally concerned, for a client seeks advice in the office how to avoid being impaled on the spear of expensive and prospective litigation. "Small business," so-called, has an important stake in antitrust enforcement.[5] Practically all commercial or industrial businesses, large or small, are members of trade associations, the latter of whose activities are viewed with an interested eye by antitrust enforcement agencies.[6] Even agricultural cooperatives[7] and labor organizations,[8] which are accorded generally an exempt status, cannot combine with non-exempt parties to achieve their objectives.

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[1] Gulf Coast Shrimpers & Oystermans Assn. v. United States, 236 F.2d 658 (5th Cir., 1956), *cert. denied,* 352 U.S. 927 (1956) (involving the Sherman Act).

[2] In the matter of Steward & Stevenson Services, Inc., Taylor Machinery Corporation, *appeal docketed,* FTC Docket 7002 (Section 5, Federal Trade Commission Act).

[3] Paramount Film Distributing Corporation v. Applebaum, 217 F.2d 101 (5th Cir., 1954), *cert. denied,* 349 U.S. 961 (1955) (Sherman and Clayton Acts); J. Howie, Trustee v. J. T. Stallings, *appeal docketed,* C.A. No. 1939 (U.S.D.C., S.D., Miss., Biloxi Div., 1954) (Robinson-Patman Act); Beach Drive-In v. Paramount, *appeal docketed,* C.A. No. 1454 (U.S.D.C., S.D., Miss. Biloxi Div., 1954) (Sherman and Clayton Acts); and Beverly Drive-In v. Paramount, *appeal docketed,* C. A. No. 1235 (U.S.D.C., S.D. Miss., Hattiesburg Div., 1956) (Sherman and Clayton Acts).

[4] As of 1957, the Section of Antitrust Law, American Bar Association, numbered more than 4,000 members, the Section being then less than 6 years old.

To aid in the recognition of some of these problems is largely the purpose of this article. Space limitations forbid more than a cursory reference to the more important statutes, and dictate that footnotes as to the leading cases or articles scantily document the textual matter.

THE GENERAL OBJECTIVE OF THE ANTITRUST LAWS

It has long been a fundamental belief of our citizens that a "dynamic and free democracy rests secure only on the foundation of a free economy."[9] Some 68 years ago, the Congress, in adopting the Sherman Act,[10] was promoted so to do in the firm belief that competition is the key to the preservation of this free economy. Though Congressional policies have been modified in certain areas of the antitrust law because of peculiar problems presented by different industries, it may be generally said that Congress has been steadfast over the years in the belief that — absent special facts requiring Government intervention— "the economic development of our resources is best determined by the cold test of competition in the market place rather than by the paternalistic plans of the police state."[11]

The United States Supreme Court pithily expressed the general objective in the following language:

> "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' "[12]

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[5] Chaffetz, The Antitrust Laws and Small Business, An Antitrust Handbook pp. 19-32 (Sec. of Antitrust Law, American Bar Association, 1958).

[6] Ruddock, The Organization and Activities of a Trade Association pp. 47-61 (Proc., Section of Antitrust Law, Spring Meeting 1955).

[7] United States v. Borden Co., 308 U.S. 188 (1939).

[8] Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797 (1945).

[9] Hansen, Enforcement Policy of United States Department of Justice, 1958 Institute on Antitrust Laws p. 55 (1958).

[10] 26 Stat. 209-210 (1890); 15 U.S.C. §§ 1-7.

[11] Van Cise, Understanding the Antitrust Laws p. 3 (Monograph, Practicing Law Institute, 1958).

[12] Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 248-49 (1951).

Again, this Court, in a later case,[13] subscribes to great faith in the impersonal judgment of the market place, when it said:

> "Basic to the faith a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take."

SHERMAN ACT

The first and greatest of the congressional commandments embodying the competitive objective of our antitrust laws is the Sherman Antitrust Act,[14] "and on it have been hung most of the principles of antitrust law enunciated by our judicial prophets."[15]

In broad and general terms, the Sherman Act condemns and brands as illegal both unreasonable restraints upon trade (Section 1) and monopolization of trade (Section 2). Chief Justice Hughes, in the *Appalachian* case,[16] briefly but forcefully declared, "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." Because of these broad, charter-like provisions, tersely put, we find one of the most glaring instances of where the competitive forces of our Nation have been dependent, not upon the Congress, but upon the Courts or the judiciary. In the interpretation of this Act, the judges have done what they dislike, if not disavow doing, namely, "legislating." Justice O. W. Holmes, in the *Southern Pacific* case,[17] unabashedly recognized that the judiciary, at times, operates in the legislative orbit, as witness:

> "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."

Just so it is, do we find in the history of the Sherman Act a remarkable record of ebb and flow — the ebb and flow of Constitutional interpretation — beginning with the *Knight* case,[18] then up on the *Swift* case,[19] and then emerges the "rule of reason" under the *Standard Oil*[20] and *Tobacco*[21] cases; and then a sag below for the *Shoe Machin-*

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[13] Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 605 (1953).
[14] 26 Stat. 209 (1890), 15 U.S.C. §§ 1 2 (1952).
[15] Van Cise, op. cit., supra, note 11, at p. 5.
[16] Appalachian Coals v. United States, 288 U.S. 344, 359-360 (1933).
[17] Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917).
[18] United States v. E. C. Knight Co., 156 U.S. 1, 12 (1895).
[19] Swift & Co. v. United States, 196 U.S. 375 (1905).
[20] Standard Oil Co. v. United States, 221 U.S. 1 (1911).
[21] United States v. American Tobacco Co., 221 U.S. 106 (1911).

ery[22] and the *United States Steel*[23] cases; and, finally, in the *Trenton*[24] case, it is declared that price-fixing is unreasonable per se, and that principle was strongly reaffirmed in *Socony-Vacuum*.[25]

The pith and substance of the Sherman Act is embodied in Sections 1 and 2 thereof, dealing respectively with restraints and monopolization of trade. These sections, therefore, will be now separately discussed. Section 3-7, the remainder of the Act, will not be separately treated because they, in the main, deal with procedural and enforcement matters, summarily blended under "Remedies," *infra*.

SECTION 1 — RESTRAINT OF TRADE

The basic provisions of Section 1 of the Sherman Act declare:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."[26]

Congress adopted the Act cognizant of the well-known doctrine of the common law,[27] and thereby sought to condemn as unlawful restraints only those which sufficiently restricted "competition" as to constitute restraints of "trade."[28] The Act was not calculated to impinge on the freedom of parties to enter into normal business contracts and was not directed at restrictions reasonably ancillary to the doing of business.[29] The Court, in the *Tobacco* case,[30] opined:

> "(t) he general character of the term 'restraint of trade' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce — the free movement of which it was the purpose of the statute to protect."

Section 1 of the Act is violated only when three conditions coexist, as follows:

First, the Section is applicable only if there is a contract, combination or conspiracy. These three terms obviously require the existence of two or more persons acting in concert. These conditions precedent of two or more persons, however, have been met even with the case of a single organization, where there is a concert of action between two or more company officers or subsidiaries, or implied understandings of the company with other parties. Company executives may not seek refuge under the traditional "corporate veil," as exemplified in the *Schine* case,[31] when the Court held:

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[22] United States v. United Shoe Machinery Co., 247 U.S. 32 (1918).

[23] United States v. United States Steel Corp., 251 U.S. 417 (1920).

[24] United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[25] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[26] 26 Stat. 209 (1890), 15 U.S.C., § 1 (without the Miller-Tydings Amendment of 1937 or Amendment of 1955).

[27] Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

[28] United States v. E. I. du Pont de Nemours & Co., 188 F. 127 (C.C. Del., 1911).

[29] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir., (1898), *aff'd* 175 U.S. 211 (1899).

[30] United States v. American Tobacco Co., 221 U.S. 106, 180 (1911).

> "The concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent."

Second, Section 1 likewise on its face is applicable only if the contract, combination or conspiracy is "in restraint of interstate or foreign trade and commerce." The terms "trade" and "commerce," as used in the Sherman Act, have been variously interpreted to include, not only the transportation of goods and passengers, but also the sale and purchase of commodities, dealing in intangibles, commercial services, other business activity for gain, and possibly also even the practice of a profession, as medicine.

Again, the phrase "interstate," implicit in the word "commerce," has been broadened, by Court interpretation, particularly within late years, to reach and embrace activities theretofore declared by the Court to be only local or intrastate. It has been construed to reach restraints within a single city[32] or state,[33] if they have a significant impact upon commerce between the states. The amount of interstate commerce need only be appreciable to invoke the Section.[34] The Court has epitomized the matter thus, "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[35]

Many have been the cases where the Courts have declared that where motion picture exhibitors are in the business of showing film which they receive from other states and which they forward to exchanges located in other states upon the release of such film, their business involves "commerce," i.e., "interstate commerce."[36] Exclusive supply contracts executed in California with service station dealers in oil products violate Section 3 of the Clayton Act, despite the fact that all products were sold under such contracts produced in that state.[37] An informative article on the word "commerce" appearing in the antitrust acts is noted below in the footnotes.[38] In the *Lorain Journal*[39] case, the Court held that though the dissemination of news in a newspaper was restricted to one locality, nevertheless it was a part of interstate commerce since the news was gathered throughout the Nation. In the *Times-Picayune*[40] case, involving advertising in New Orleans papers, the Court declared, "it is now beyond dispute that the activities challenged in this case are sufficiently 'trade or commerce' relating to the interstate economy to fall under the wide sweep of the Sherman Act."

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[31] Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 116 (1948).

[32] United States v. Employing Plasters Assn. of Chicago, 347 U.S. 186 (1954).

[33] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

[34] United States v. Yellow Cab Co., 332 U.S. 218 (1947).

[35] United States v. Women's Sportswear Manufacturers Assn., 336 U.S. 460 (1949).

[36] United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

So broad has been the sweep of judicial interpretation as to the words "trade or commerce" within the past fifteen years, that the Court of Appeals for the Seventh Circuit had occasion to declare:

> "We are not unmindful of the fact that the commerce clause has been broadly interpreted, in fact, to such an extent, that it sometimes appears that there is embraced in its broad sweep all the activities of mankind."[41]

The observations made above concerning the expanded and expanding concepts of interstate commerce point up in poignant fashion why Mississippi lawyers — and by the same token, lawyers of other States—must keep abreast of Federal antitrust developments.

Third, and finally, Section 1 of the Sherman Act applies to a transaction squaring with the above statutory tests only if the combination, conspiracy or contract in restraint of trade is an undue restraint of "competition" sufficient to amount to a restraint of "trade."[42] As the Court said in *Standard Oil,*[43] the purpose of Congress was to treat:

> "as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade."

As to what contracts, combinations or conspiracies have a purpose or effect to unduly or unreasonably restrain trade, Congress has left for the Courts to determine. By judicial accretion intervening through the years, certain contractual restraints have been declared or presumed to be *per se* unlawful, namely, those whose purpose or effect is "solely to control the prices in or foreclose access to the market place," as "agreements between competitors whose only purpose is to fix prices, allocate territory, or boycott third parties" and "transactions between competitors – regardless of primary purpose – whose principal effect is to cause an unnatural increase in the general level of prices in or arbitrarily to exclude other competitors from the market."[44]

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[37] Standard Oil Co. v. United States, 337 U.S. 293 (1949).

[38] Searles, Trade or Commerce Among the Several States or With Foreign Nations, An Antitrust Handbook pp. 141-154 (Section of Antitrust Law, A.B.A., 1958).

[39] Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

[40] The Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

[41] United States v. Starlite Drive-In, Inc., 204 F.2d 419, 421 (7th Cir., 1953).

[42] Van Cise, op. cit., note 11, supra, at pp. 8-9.

[43] Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

Other contractual restraints are stigmatized under Section 1 only if a judicial analysis of their purpose and effect, in the light of all the surrounding facts, reveals an undue restriction of trade.[45] Here it is that the Court applies the judicial yardstick of reasonableness, generally referred to as the "rule of reason," and here again *Standard Oil*[46] points up the touchstone of reason:

> " (t) he standard of reason . . . was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

Vigorous minds of distinguished jurists, with widely divergent views, have fashioned this "rule of reason" on the judicial lathe.[47]

SECTION 2 – MONOPOLIZATION OF TRADE

Section 2 of the Sherman Act succinctly declares:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."[48]

Obviously, Section 2 supplements Section 1 of the Act by condemning the end product of unreasonable restraints, to-wit, monopolization. Mere size or dominance, though evidential, is not condemned thereby. What is condemned, however, is "possession of power by anyone to control the prices in and to foreclose access to the market, provided that such power has been attained, maintained or used by methods from which an intent to exercise that power may be presumed."[49] Control of the market achieved by unnatural barriers is forbidden. The Court, in the *Tobacco*[50] case, interpreted the Act thus:

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[44] Van Cise, op. cit., note 11, supra, at pp. 9, 10.

[45] Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

[46] Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

[47] Handler, The Judicial Architects of the Rule of Reason pp. 21-39 (Section of Antitrust Law, A.B.A., Spring Meeting, 1957).

[48] 26 Stat. 209 (1890). 15 U.S.C. § 2 (Supp. 1957).

> "A correct interpretation of the statute and of the authorities make it the crime of monopolizing, under Section 2 of the Sherman Act, for parties, as in these cases, to . . . have such a power that they are able . . . to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power."

Section 2, moreover, condemns an attempt by a single person, and conspiracies or combinations by two or more persons, to monopolize. Thereby, the Courts are enabled to reach both joint and several actions seeking monopoly, whether or not monopoly is achieved. Here, the Act does not require proof of possession of power to achieve the end result of unreasonable restraints, namely, power to raise prices and exclude competitors, as it does in the case of a charge of monopolization. It does, however, "require a finding of specific intent by the person or persons involved either to achieve the unlawful end or to conspire to do so."[51] This intent, of course, can be spelled out by circumstantial evidence.[52]

Section 2 of the Act has been construed to apply to a variety of geographical area limitations. It has been narrowly construed to apply to access to a building[53] or a terminal[54] and competition in a small town[55].

Monopolies, in the popular or colloquial sense, are to be distinguished from the legal concept. This distinction is made clear in the *Paramount*[56] case, when the Court declared:

> "(I) n the popular sense there is a monopoly if one person owns the only theatre in town. That usually does not, however, constitute a violation of the Sherman Act. But as we noted in *United States v. Griffith,* 334 U.S. 101 (1948), even such an ownership is vulnerable in a suit by the United States under the Sherman Act if the property was acquired, or its strategic position maintained, as a result of practices which constitute unreasonable restraints of trade. Otherwise, there would be reward from the conspiracy through retention of its fruits."

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[49] Van Cise, op. cit., note 11, supra, at p. 11.

[50] American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

[51] Van Cise, op. cit., note 11, supra, at p. 12.

[52] Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

[53] Gamco, Inc. v. Providence Fruit & Produce Building, 194 F.2d 484 (1st. Cir., 1952), *cert. denied,* 344 U.S. 817.

[54] United States v. Terminal R.R. Association of St. Louis, 224 U.S. 383 (1912).

[55] White Bear Theatre Corp. v. State Theatre Corp., 129 F.2d 600 (8th Cir., 1942).

[56] United States v. Paramount Theatres, Inc., 334 U.S. 131, 171 (1948).

CLAYTON ACT

While the Sherman Act is couched in broad, general terms, the Clayton Act, consisting of more than twenty sections, passed in 1914, generally accredited to the behest of President Wilson, is in more detailed language, undertaking to satisfy President Wilson's call for prohibition of restrictive practices "in such terms as will practically eliminate uncertainty."[57] The Act sought to further insure this Nation a competitive economy by specifically spelling out and prohibiting certain enumerated practices, and purported "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."[58]

Because of the length of the Act[59] and the pagination practicalities of this paper, only three sections of said Act will be discussed, these being the more important ones, namely, Sections 2, 3, and 7. Because Section 2 has been amended by, and is now identical with, the first section of the Robinson-Patman Act, the treatment thereof will be pretermitted to a discussion of the latter act hereinafter.

SECTION 3— EXCLUSIVE-DEALING ARRANGEMENTS TYING CLAUSES AND TOTAL-REQUIREMENTS OBLIGATIONS

Section 3 of the Clayton Act prohibits certain kinds of contractual arrangements setting up the distributing or marketing method of a manufacturer or one in like position.[60] It provides that it shall be unlawful for any person engaged in interstate or foreign commerce to lease or sell commodities for use, consumption or resale within the United States or its territories, or to fix a price charged therefor:[61]

> "on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

In short, the section deals with "tying clauses, exclusive-dealing arrangements and total-requirements obligations contained in leases and sales."[62]Agency arrangements or simple refusals to sell are not thereby automatically condemned.[63] The section prohibits contractual restraints only if they involve commodities, not services, and condemn such restraints solely if they require a lessee or purchaser to refrain from doing business with a competing lessor or vendor, and only when and where such practices "probably" (not "possibly"[64]) would substantially lessen competition or tend to create a monopoly.

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[57] McAllister, Where the Effect May Be to Substantially Lessen Competition or Tend to Create a Monopoly, An Antitrust Handbook p. 210 (Section of Antitrust Law, A.B.A., 1958).

[58] H.R. 627, 63d Cong., 2d Sess. § 1 (1914).

[59] 7 Toulmin's Anti-Trust Laws pp. 4-25 (1952).

[60] McAllister, supra, note 57, at p. 216.

[61] Van Cise, op. cit., supra, note 11, at p. 19.

[62] Ibid., at p. 19.

Despite the *Standard Stations*[65] case, it does not appear that said Section 3 condemns all tying, exclusive-dealing and total-requirements agreements involving commodities, nor all such agreements involving a substantial volume of business.[66] The Courts and the Federal Trade Commission are to consider cases under this section in the "light of reason" and thus to take into consideration whether such agreements are entered into between parties sufficiently strong to be capable of arm's-length bargaining[67] whether the same be of reasonable duration[68] or whether such agreements are necessary to protect good will,[69] or the like.

SECTION 7 — CORPORATE ACQUISITIONS AND MERGERS

As amended in 1950, Section 7 of the Clayton Act, with varying exceptions, prohibits the acquisition by a corporation, in interstate or foreign commerce, unless solely for investment, of:[70]

> "the whole or any part of the stock or . . . assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[71]

The section affects transactions only between corporations engaged in interstate or foreign commerce of this country, involving acquisitions of stock or assets, regardless of whether said corporations do or do not compete, but does not involve acquisitions by or from individuals, partnerships or foreign corporations not engaged in such United States commerce.[72] Such section does not condemn a corporate acquisition of such stock or assets of another unless it "probably" (not merely "possibly"[73]) will substantially lessen competition or tend to create a monopoly in a line of commerce in some section of the country. Here again, the Courts and the Federal Trade Commission must weigh all relevant facts in the "light of reason" to ascertain whether the transaction would "probably lessen competition" within the area of effective competition.[74]

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[63] Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568 (1923).

[64] Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922).

[65] Standard Oil Co. v. United States, 337 U.S. 293 (1948).

[66] Federal Trade Commission v. Motion Picture Adv. Co., 344 U.S. 392 (1953), *dissenting opinion therein.*

[67] Id.

[68] Ibid; Hunter Douglas Corp. v. Lando Products, Inc., 235 F.2d 631 (9th Cir, 1956).

[69] Federal Trade Commission v. Sinclair Refining Co., 261 U.S. 463 (1923).

[70] Van Cise, op. cit., supra, note 11, at p. 22.

[71] Clayton Act, § 7; 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950); 15 U.S.C., § 8 (1952).

[72] Van Cise, op. cit., note 11, at p. 22.

In the recent and famous *Du Pont*[75] case, wherein it was thought Section 7 of the Clayton Act played only a minor part in the Court below, the Supreme Court declared:

> "Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevent market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended."

ROBINSON - PATMAN ACT

As stated above, Section 1 of the Robinson-Patman Act[76] is an amendment of, and hence now constitutes, Section 2 of the Clayton Act. The Act (Robinson-Patman) is the "most awkwardly drafted"[77] and is one of the "most controversial themes"[78] in present-day antitrust legislation. Proponents of the law have vigorously hailed it as the "Magna Charta of Small Business," while opponents, at the same time, have "with about the same degree of emotion, characterized it as a 'price-fixing statute hiding in the clothes of anti-monopoly and procompetition symbols.' "[79]

Suffice it to say, it has been very difficult for the Court to reconcile the Robinson-Patman Act with the Sherman and Clayton Acts.[80] The full Court, in 1951, in the *Standard Oil Co.*[81] case, made an outright concession as to the difficulties inherent in any attempt to "reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts." In *Automatic Canteen*,[82] the Supreme Court admitted the danger that strict enforcement of the Robinson-Patman Act might foster a "price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." In said case, the Court went on to hold further, however, that in the areas of conflict, or apparent conflict, the Robinson-Patman Act must yield to the broader antitrust policies laid down by Congress.

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[73] United States v. E. I. du Pont de Nemours & Company, 353 U.S. 586, 598 (1957).

[74] Ibid., at p. 589.

[75] United States v. E. I. du Pont de Nemours & Company, 353 U.S. 586 (1957).

[76] Robinson-Patman Act, § 1; 49 Stat. 1526 (1936); 15 U.S.C., § 13 (1952).

[77] Van Cise, op. cit., note 11, supra, at p. 25.

[78] Timberg, The Robinson-Patman Act—Birth Pangs and Adolescent Pains. Trade Regulation Series No. 3, at page 1 (1956).

[79] Howrey, Good Faith Meeting of Competition, Antitrust Law Symposium, "How to Comply with the Robinson-Patman Act", p. 50 (1957).

[80] Report, Attorney General's National Committee to Study the Antitrust Laws, passim pp. 129-132 (1955).

[81] Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231 (1951).

Section 1 of the Robinson-Patman Act, enforceable both in the Courts and before the Federal Trade Commission, prohibits certain discrimination in *prices* in sub-sections (a) and (b) and certain discrimination in practices in sub-sections (c) through (e). Three provisos of said sub-sections (a) and (b) then carve out exceptions to the general prohibitions of Section 1,[83] the first two of said provisos declaring that "nothing herein contained shall prevent" differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities sold or delivered (proviso 1) or "price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned . . . ." (proviso 2). Proviso 3, the subject of construction in the protracted *Standard Oil Company*[84] litigation, significantly declares:

> "(3) Provided, however, that nothing herein contained shall prevent a seller . . . showing that his lower price or the the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Sub-section (a) of the Act generally declares that it is unlawful for any person, in interstate or foreign commerce, to discriminate in price between purchasers of commodities of like grade and quality sold for use, consumption or resale within the United States and its territories:

> "where the effect of such discrimination may be substantially to lessen competiton or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competiton with any person who either grants or knowingly receives the benefit

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[82] Automatic Canteen Co. v. Federal Trade Commission, 346 U.S. 61 (1953).

[83] Van Cise, op. cit., note 11, supra, at p. 26.

[84] Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231 (1951); and its sequel, Federal Trade Commission v. Standard Oil Co., 355 U.S. 396 (1958).

of such discrimination, or with customers of either of them."

As noted, the Act does not prohibit absolutely price discrimination; such discrimination is prohibited and condemned only when the Courts and the Federal Trade Commission, "in the light of reason," find that its effect "may" be "substantially" to lessen competition. Although the *Morton Salt*[85] case held that such price discrimination was unlawful if there is a reasonable "possibility" of injury to competition, it seems fair to state that most of the cases hold that the Act is violated only when the price differential will "probably" cause such injury to competition. Injury to "competition," and not merely injury to a competing "person," is inveighed against by the Act. In order for a buyer to prevail under the Act against a seller who discriminates in price, the buyer must show that competition between buyers, that is, between him and another or others, was affected or injured.

As for discriminatory practices, forbidden by the Act, sub-sections (c) through (e) respectively prohibit: (c) Payment or acceptance of brokerage by or between sellers and buyers; and (d) and (e) Sellers from paying for or furnishing services or facilities unless competing buyers are offered proportionately similar or comparable treatment.

Fundamentally, the remaining provisions of the Robinson-Patman Act are to the effect following: (a) Section 1 (f) makes the buyer, as well as the seller, liable for unlawful price discrimination under a certain set of circumstances; and (b) Section 3 of said Act supplements Section 1 with a criminal statute — independently of the remainder of the Act — by prohibiting a variety of discriminatory and predatory pricing practices.[86] Although the Courts, as to said Section 3 of the Robinson-Patman Act, previously to the year 1958 had held that the same was available in private actions, as well as criminal proceedings brought by the Government, the Supreme Court, in the *Nashville Milk*[87] case, definitely held that this Section was not available in suits brought by private litigants.

FEDERAL TRADE COMMISSION ACT

The Federal Trade Commission Act[88] was passed in 1914, during the administration of President Woodrow Wilson, who is generally credited with originating the idea, though some[89] point out that President Theodore Roosevelt germinated the thought. Regardless of the genesis of the idea, Congress sought, by its enactment, to bolster and supplement judicial enforcement of the antitrust laws through the administrative process of a commission by experts in the field of trade regulation. The Court, in the *Keppel*[90] case, concluded:

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[85] Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948).

[86] Van Cise, op. cit., note 11, supra, at p. 31.

[87] Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958); *reh. den.*

[88] Act of September 26, 1914, c. 311; as amended, 15 U.S.C., §§ 41-58 (1958).

[89] Howrey, The Federal Trade Commission—Present Problems and Suggested Changes p. 41 (Proc. Section of Antitrust Law, Spring Meeting, 1957).

> "It was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected.' "

The heart of this Act is contained in the first sentence of sub-section (a) of Section 5[91] of the Act, as follows:

> "(a). Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful."

The Act, while not technically classed as an antitrust law by Congress in the Clayton Act,[92] in reality constitutes a very vital part of the body of antitrust law. The phrase, "unfair methods of competition," embraces unreasonable restraints[93] in interstate and foreign commerce, and the Act goes further to prohibit "unfair or deceptive acts or practices," irrespective of whether or not they constitute "methods of competition." By virtue of the generality of the language used in the Act, particularly in the use of the word "unfair," much, perforce, has been left for interpretation by the Courts and the Commission in the use of "the gradual process of judicial inclusion and exclusion."[94]

Congress, in the passage of this Act, empowered this administrative body, the Federal Trade Commission, with the authority to issue cease and desist orders against persons, firms or corporations guilty of violations of the Sherman Act not only when "full-blown," but also when in their "incipiency," as witness the following excerpt from the *Motion Pictures Advertising*[95] case:

> "The 'unfair methods of competition,' which are condemned by Section 5 (a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act . . . . It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipi-

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[90] Federal Trade Commission v. R.F. Keppel & Bro., Inc., 291 U.S. 304 (1934).

[91] 38 Stat. 719 (1914); 15 U.S.C., § 45 (1958).

[92] Clayton Act, 38 Stat. 730 (1914); 15 U.S.C. § 12 (1952).

[93] Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948).

[94] Federal Trade Commission v. R. F. Keppel & Bro., Inc., 291 U.S. 304 (1934).

[95] Federal Trade Commission v. Motion Picture Advertising Co., 344 U.S. 392 (1953).

ency acts and practices, which, when full blown, would violate those Acts."

Other provisions of this Act grant to the Commission broad powers of investigation and authorize it to proceed against false advertising of food, drugs and cosmetics. Certain other provisions, not of particular interest to the general practitioner, appear in supplemental legislation conferring miscellaneous jurisdiction on the Commission over special products.

REMEDIES FOR ANTITRUST ENFORCEMENT

A. Governmental Remedies

From the various weapons for the enforcement of the antitrust laws with which Congress has armed the Department of Justice and the Federal Trade Commission, it cannot be said that their arsenal is in short supply. Our Government, thereby, is enabled to proceed against antitrust violators through criminal action, civil action and administrative proceedings—all of which may be launched simultaneously—and the civil and administrative actions may be successfully prosecuted even though the criminal action results in an acquittal.[96]

An indictment or information may be brought by the Department of Justice to punish violations of the Sherman Act and Section 3 of the Robinson-Patman Act. Violations of the Sherman Act, by the 1955 Amendment,[97] carry a penalty in the nature of a fine not exceeding $50,000, or by imprisonment not exceeding one year, or both, in the discretion of the Court. Conviction under Section 3 of the Robinson-Patman Act carries a fine of not more than $5,000, or imprisonment for not more than one year, or both.[98]

The civil action brought by the Department of Justice and the administrative proceeding by the Federal Trade Commission are primarily injunctive in nature, although by a recent amendment,[99] if he United States is injured "in its business or property by reason of anything forbidden in the antitrust laws," it may sue for actual damages therefor. Although, as stated, these public civil remedies are primarily injunctive in nature, one can be assured that if the case goes against him, finding him in violation of the applicable antitrust act, he can expect "some fencing in."[100]

Such "fencing in," thus characterized by the Court, may result in a defendant finding himself or itself with an order decreeing separation of divisions of an integrated company,[101] or even outright dissolution, if a corporation,[102] or the like. This recalcitrant defendant may be forced to license and sell where he does not want to license or sell[103] and be subjected to visitations by the Government.[104] Again, the Government is armed with a very potent weapon in the nature of instituting criminal or civil contempt if violation of a final order or decree ensue.

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[96] United States v. National Association of Real Estate Boards, 339 U. S. 485 1950).

[97] Sherman Act §§ 1-2; 69 Stat. 282 (1955); 15 U.S.C., §§ 1-2 (1955).

[98] Robinson-Patman Act § 3; 49 Stat. 1528 (1936); 15 U.S.C. 13a (1936).

[99] 69 Stat. 282 (1955); 15 U.S.C., § 15a (1955).

[100] Federal Trade Commission v. National Lead Co., 352 U.S. 419, 431 (1957).

B. REMEDIES OF THE PRIVATE SUITOR

By Section 4 of the Clayton Act,[105] it is provided that any person "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may sue, without respect to the amount in controversy, and recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. Though it has been said that "the private remedy is incidental"[106]—the primary purpose being the protection of the public—the number of private suits filed in recent years, some of which have resulted in "(L) arge recoveries . . . in most unlikely cases,"[107] would lead one to believe that private remedies are on a parity with public remedies. It has been said that the treble-damage action given private parties "was designed to supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement."[108]

Section 16 of the Clayton Act[109] also gives such private party, i.e., "Any person, firm, corporation, or association," the right to sue for and have injunctive relief "against threatened loss or damage by a violation of the antitrust laws." Such injunctive relief may be sought independently of, or in conjunction with, the suit for treble damages.

The private suitor may file suit or action "in any District Court of the United States in the district in which the defendant resides or is found or has an agent;"[110] or if the defendant be a corporation, such action may be brought "not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business,"[111] and "all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."[112] A review of the cases convincingly demonstrates that comparatively slight acts hold the corporation amenable under the phrase, "transacts business," as opposed to the phrase, "doing business." While formerly the applicable state statutes of limitations controlled as to actions under the antitrust laws, since 1955 the Federal law has pre-empted the field and provided that an action is barred unless "commenced within four years after the cause of action accrued."[113]

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[101] United States v. Paramount Pictures, Inc., 85 F.Supp. 881 (S.D.N.Y. 1949).
[102] United States v. American Tobacco Co., 221 U.S. 106 (1911).
[103] Besser Mfg. Co. v. United States, 343 U.S. 444 (1952).
[104] United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944).
[105] 38 Stat. 731 (1914); 15 U.S.C., § 15 (1914).
[106] 6 Toulmin's Anti-Trust Laws, § 16.4, p. 391 (1951).
[107] Van Cise, op. cit., note 11, supra, at p. 39.
[108] 6 Toulmin's Anti-Trust Laws § 16.4, p. 391.
[109] 38 Stat. 737 (1914); 15 U.S.C., § 26 (1914).
[110] Clayton Act, § 4; 38 Stat. 731 (1914); 15 U.S.C., § 15 (1914).
[111] Clayton Act, § 12; 38 Stat. 736 (1914); 15 U.S.C., § 22 (1914).
[112] Id.

Through the influence of President Wilson, Section 5 of the Clayton Act was enacted to the end that the statute of limitations during a Government suit is suspended, and additionally provides that a judgment (other than by consent) entered against a defendant in that action "shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant . . . as to all matters respecting which such judgment or decree would be an estoppel as between the parties thereto."[114]

The "ebb and flow," referred to in the forepart of this paper, but mostly "flow," has manifested itself strikingly in substantially narrowing defenses theretofore deemed formidable or insurmountable, namely, such defenses as "that interstate commerce is not involved, uncertainty in the amount of damages and *in pari delicto*."[115] Ilustrative cases pointing up the trend of the Courts along said lines, in the procedural or adjective field, appear in the footnotes hereto.[116] Further, in the field of adjective law, until *Theatre Enterprises*,[117] the doctrine of "conscious parallelism"[118] had made serious inroads on the traditional idea of the weight of the evidence, or even burden of proof.

Various types of plaintiffs, as customers, competitors, suppliers, licensees, and others comparably situated, have been allowed to sue and recover under the antitrust acts. The Court has declared[119] that Congress:

> " (i)ntended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee."

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[113] 69 Stat. 283 (1955); 15 U.S.C., § 15b (1955).

[114] Clayton Act, § 5, 38 Stat. 731 (1914); 15 U.S.C., § 16 (1952); interpreted in Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

[115] Van Cise, op. cit., note 11, supra, at p. 39.

[116] Mandeville Island Farms Co., Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) (as to the defense that "interstate commerce is not involved"); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) (as to the defense, "uncertainty in the amount of damages"); and Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (as to the defense, "in pari delicto").

[117] Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).

[118] Sorkin, Conscious Parallelism, The Antitrust Bulletin pp. 281-302 (March 1957).

[119] Bruce's Juices, Inc. v. American Co., 330 U.S. 743, 751-52 (1947).

In summary, the Mississippi lawyer, in this progressive era we are witnessing, will certainly want to fortify his position as advisor to his clients by familiarizing himself with antitrust jurisprudence and keeping himself abreast of its development.

STATE SOVEREIGNTY AND THE FOUNDING FATHERS †-I

*William P. Murphy**

INTRODUCTION

In an earlier article it was seen that there were two broad divisions of thought during the revolution and confederation periods as to the proper distribution of power between Congress and the states and specifically, on the question whether ultimate political sovereignty should rest with the central or with the state governments. The writer endeavored to put these conflicting views in the context of their time by showing that these political attitudes were the result of conflicting social and economic interests between "conservatives" and "radicals" and that each group supported that view of political structure and power under which its own interests were more apt to be protected or realized. Disclaimer was specifically made that such motivation was a complete or absolute explanation of the beliefs and acts of the leaders of the period. The writer is convinced that the generalization covers a majority of the individual cases. But whether this explanation of the fact be a valid one or not, the fact itself does remain that during the period there were these two basically conflicting philosophies of national supremacy as opposed to state sovereignty. And the fact does remain that each school of thought had its own coterie of leaders, whatever might have been the reason which brought these men to support one view or the other.

Some indication was given in the earlier article of the efforts made by the nationalists to increase the powers of Congress by amendments to the Articles. In each case the attempt failed as a result of the provision requiring the consent of all thirteen state legislatures to any alteration. But while these attempts to achieve stronger central authority were being regularly sacrificed on the altar of state sovereignty, other measures were being taken outside of Congress by the nationalists, measures which eventually were to bring about the abolition of the confederation system. Reference was made to the fact that most of the published political writing of the period was the work of nationalists denouncing the failures of the Articles and urging the need for stronger

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†This article, which is to appear in three parts, is a continuation of a study which began in an earlier article, State Sovereignty Prior to the Constitution, 29 Miss. L. J. 115 (1958). Occasion is taken here to correct two errata in that article. On page 115, the second sentence of the second paragraph should not be in quotation marks. On page 155, line 17, "needs and the people" should read "needs of the people."

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national power. Giving action to their words, the nationalists by a series of shrewdly timed maneuvers brought about the series of events which finally culminated in the constitutional convention. The idea of providing for an adequate government through a convention had been advanced by Alexander Hamilton in 1780, even before the Articles had been ratified. In 1783 he tried without success to persuade Congress to pass resolutions declaring the inadequacy of the confederation and calling for a convention drawn from all the states to remedy its defects. In 1785, Massachusetts conservatives had elected their leader James Bowdoin as governor and were temporarily in control. Under Bowdoin's leadership, the opportunity was seized to put through the legislature a resolution calling for a convention to recommend enlargements of the power of the central government. In 1786, after consultation with Washington and others at Mount Vernon, Madison was instrumental in bringing about the adoption by the Virginia legislature of a resolution calling on all the states to send commissioners to a meeting which would consider the whole subject of the trade and commerce of the United States. This resolution led to the Annapolis convention which met in September 1786.

The moving spirits at the Annapolis Convention were Alexander Hamilton and James Madison. The meeting was attended by other well-known conservatives interested in commercial reform, and although it did not realize its immediate purpose due to the failure of most of the states to send delegates, it nevertheless afforded the opportunity to send out the call for a general convention. The Annapolis delegates therefore unanimously adopted a report drafted by Hamilton which proposed that a convention of delegates from all the states meet at Philadelphia on the second Monday in May, 1787, "to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled, as, when agreed to by them, and afterwards confirmed by the legislatures of every state, will effectually provide for the same."

Congress, led by the adherents of state sovereignty, opposed the idea as being an encroachment on its own prerogatives, and it is of course true that the Articles provided that amendments should be proposed by Congress and made no mention of a convention. To overcome this opposition, the nationalists undertook a campaign to bring sufficient pressure to force favorable action by Congress. Without waiting for Congressional sanction, the Virginia legislature, under the leadership of Madison, approved the recommendation of the Annapolis convention and appointed its delegates to the convention, headed by the pre-eminent name of Washington and including Madison, Governor Edmund Randolph, and George Mason. New Jersey and Pennsylvania acted before the year was out, adding to the list of delegates other names which were illustrious throughout the states. Early in 1787 North Carolina and Delaware appointed delegates. In New York Hamilton, in the face of the opposition of Governor Clinton to the strengthening of the confederation, was successful, by masterful political maneuvering, in carrying a resolution in which the legislature called upon the state delegation in Congress to press for a convention. Massachusetts, under the leadership of Bowdoin, was next in appointing delegates, with Rufus King, who had originally opposed the idea, now approving and becoming a delegate. Under the pressures of this campaign, Congress yielded. To save face, however, the recommendation for a convention as it went out from Congress to the states made no reference to the Annapolis Convention, but made its own proposal identical as to time and place to that recommended by the Annapolis delegates. The resolution furthermore was careful to limit the purpose of the convention to be a revision of the Articles of Confederation, and expressly provided that amendments and new provisions were to be reported to Congress for its approval and for subsequent unanimous state ratification as required by the Articles.

A consideration of the events which culminated in the calling of the meeting in Philadelphia, and of the men who brought these events to pass, leaves no room for doubt on one very important point. The Constitutional Convention of 1787 was the result of a carefully executed plan and program, carried out under the leadership of those individuals who, throughout the confederation period, had consistently adhered to the view of national supremacy over the states. To this convention there came delegates from twelve states, all except Rhode Island. A total of seventy-four delegates were chosen, but nineteen of these either declined to accept appointment or failed to attend the convention. Of the fifty-five who did attend, many were present only part of the time, in some cases very briefly or sporadically. The average daily attendance was about thirty, and no more than eleven states were represented at any one time. The Convention began on May 25 and adjourned on September 17, and in the end thirty-nine delegates signed the Constitution. During this period of almost four months, the convention met in private sessions with all members sworn against disclosure of the proceedings. The reason for the secrecy rule was to free the delegates from any sense of political restraint in the expression of their views and thus to encourage the maximum possible freedom of discussion and deliberation. The rule achieved its purpose, for the delegates debated the issues before them with a candor and frankness extremely rare in popular assemblies. This is revealed from the records of the debates and the proceedings of the convention which, fortunately for succeeding generations, were kept by many of the delegates.[1] Although in terms of volume these records do not begin to approximate everything which must have been said over the four month span, there is no historical doubt that they do give an accurate insight of the views of the delegates. The purpose of this article is to ascertain, wherever possible from their own words in the Convention, the attitude of the framers of the Constitution on the fundamental proposition of state sovereignty as opposed to national supremacy. Conclusions reached will not depend for their validity on the conservative-radical theory advanced earlier, for such an inquiry can be made without necessary reference to the underlying reasons and motives which led each individual to hold the views that he did.

THE VIRGINIA DELEGATES

1. *George Washington.* More than any other person at the Convention, Washington had personally experienced, as commander-in-chief of the continental army, the consequences of the impotence of the central government and the sovereignty of the states. His correspondence during the years prior to the Convention clearly reveals the strong opinions he had formed on the subject. A letter to Dr. William Gordon in 1783 set forth his view of the basic difficulty. ". . . certain I am that, unless adequate powers are given to congress for the general purposes of the federal union, we shall soon moulder into dust, and become contemptible in the eyes of Europe, if we are not made the sport of their politics. To suppose that the general concerns of this country can be directed by thirteen heads, or one head without competent powers, is a solecism, the bad effects of which every man who has had the practical knowledge to judge from, that I have, is fully convinced of though none perhaps has felt them in so forcible and distressing a degree."[2]

The remedy for the problem Washington stated in succinct fashion. "I do not conceive we can exist long as a nation without having lodged somewhere a power, which will pervade the whole Union in as energetic a manner as the authority of the State governments extends over the several States."[3] In his letter to Gordon, Washington elaborated his conception of the proper relationship which should prevail between nation and state. "We are known by no other character among nations than as the United States. Massachusetts or Virginia is no better defined nor any more thought of by foreign powers than the county of Worcester in Massachusetts is by Virginia, or Gloucester County in Virginia is by Massachusetts (respectable as they are); and yet these counties with as much propriety might oppose themselves to the laws of the state in which they are, as an individual state can oppose itself to the federal government by which it is or ought to be bound. Each of these counties has, no doubt, its local policy and interests. These should be attended to and brought before their respective legislatures, with all the force their importance merits; but when they come in contact with the general interests of the state, when superior considerations preponderate in favor of the whole, their voices should be heard no more. So should it be with individual states when compared to the union. Otherwise I think it may properly be asked, for what purpose do we farcically pretend to be united? Why do congress spend months together in deliberating upon, debating, and digesting plans, which are made as palatable and as wholesome to the Constitution of this country as the nature of things will admit of, when some states will pay no attention to them, and others regard them but partially . . . . For heaven's sake, who are congress? Are they not the creatures of the people, amenable to them for their conduct, and dependent from day to day on their breath? Where can be the danger of giving them such powers as are adequate to the great ends of government and to all the general purposes of the confederation?"[4] It is clear that Washington considered some matters too local in their nature to be of national importance, for he then added: "I repeat the word general, because I am no advocate for their having to do with the particular policy of any state, further than it concerns the union at large."[5]

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[1] The most complete notes were kept by James Madison. Fragmentary notes were kept by Robert Yates, Rufus King, James McHenry, William Pierce, William Paterson, Alexander Hamilton, Charles Pinckney, and George Mason. In this article all quotations from the debates in the convention are taken from Madison's notes, unless otherwise indicated. The definitive compilation of the materials is Max Farrand's The Records of the Federal Convention, Revised Edition (1937) in four volumes. This work is cited herein as Records. Biographical data is taken from the Dictionary of American Biography. Spelling and punctuation have been modernized occasionally for easier reading.

[2] Quoted in I Bancroft, History of the Constitution of the United States p. 320 (1885).

But it is equally clear that Washington was of opinion that what concerned the union at large was a determination to be made by the central authority, and not by the states, since it was a question which turned on considerations not local in their nature. Writing to Henry Knox in 1784, Washington said that ". . . certain it is, in my opinion, that there is a kind of fatality attending to all our public measures: inconceivable delays—particular states counteracting the plans of the United States when submitted to them, opposing each other upon all occasions torn by internal disputes, or supinely negligent and inattentive to everything which is not local, and self-interests, and very often short-sighted in these, make up our system of conduct. Would to God our own countrymen, who are entrusted with the management of the political machine, could view things by that large and extensive scale upon which it is measured by foreigners and by the statesmen of Europe, who see what we might be, and predict what we shall come to. In fact, our federal government is a name without substance; no state is longer bound by its edicts than it suits present purposes without looking to the consequences. How, then, can we fail in a little time becoming the sport of European politics and the victim of our own folly?"[6] And Washington made the point even plainer in a letter of 1785. "We are either a united people under one head, and for federal purposes, or we are thirteen independent sovereignties eternally counteracting each other. If the former, whatever such a majority of the states as the Constitution points out conceives to be for the benefit of the whole, should, in my humble opinion, be submitted to by the minority . . . . I confess to you, candidly, that I can foresee no evil greater than disunion; than those unreasonable jealousies (I say unreasonable, because I would have a proper jealousy always awake, and the United States on the watch to prevent individual states from infracting the Constitution with impunity) which are continually poisoning our minds and filling them with imaginary evils for the prevention of real ones."[7]

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[3] Quoted in McLaughlin, A Constitutional History of the United States p. 144, n. 10 (1935).

[4] Supra note 2 at 321 and 322.

[5] Supra note 2 at 322.

It is also clear from Washington's correspondence that he recognized the necessary reforms would not be forthcoming without a drastic overhaul in the governmental structure. Writing to Madison in 1786, Washington stated that "Without an alteration in our political creed, the superstructure we have been seven years in raising, at the expense of so much treasure and blood, must fall. We are fast verging to anarchy and confusion . . . . To you, I am sure, I need not add aught on this subject. The consequences of a lax or inefficient government are too obvious to be dwelt upon. Thirteen sovereignties pulling against each other, and all tugging at the Federal head, will soon bring ruin on the whole; whereas a liberal and energetic Constitution, well guarded and closely watched to prevent encroachments, might restore us to that degree of respectability and consequences, to which we had a fair claim and the brightest prospect of attaining."[8] And on the eve of the Convention, in March, 1787, Washington again wrote to Madison: "That a thorough reform of the present system is indispensable, none who have capacities to judge, will deny . . . . I confess, however, that my opinion of public virtue is so far changed, that I have my doubts whether any system, without the means of coercion in the sovereign, will enforce due obedience to the ordinances of a General Government; without which every thing else fails . . . . I am desirous of knowing how this matter is, as my wish is that the Convention may adopt no temporizing expedients, but probe the defects of the Constitution to the bottom, and provide a radical cure, whether they are agreed to or not."[9] Washington was not, however, sanguine about the prospects for success. Writing to Jay in 1787, he said: "But is the public mind matured for such an important change . . .? My opinion is, that this country has yet to *feel* and *see* a little more before it can be accomplished. A threat for power, and the bantling – I had like to have said MONSTER – sovereignty, which has taken such fast hold of the states individually, will, when joined by the many whose personal consequence in the line of state politics will in a manner be annihilated, form a strong phalanx against it . . . ."[10]

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[6] Supra note 2 at 401.
[7] Quoted in Curtis, Constitutional History of the United States pp. 266-67 (1897).
[8] Quoted in Warren, The Making of the Constitution p. 34 (1928).

At first reluctant to become a delegate for reasons of personal health and finances, Washington was finally persuaded, chiefly by Madison and Randolph, that his prestige would be instrumental in the success of the effort. He was unanimously chosen as presiding officer, and as such did not enter into the debates. It is clear that he maintained, throughout the Convention, his earlier views. Thus, writing to David Stuart in July, 1787, while the Convention was in progress, he stated: "Persuaded I am that the primary cause of all our disorders lies in the different State Governments, and in the tenacity of that power which pervades the whole of their systems. Whilst independent sovereignty is so ardently contended for, whilst the local views of each State and separate interests by which they are too much governed will not yield to a more enlarged scale of politics; incompatibility in the laws of the different States, and disrespect to those of the general government must render the situation of this great country weak, inefficient and disgraceful. It has already done so, – almost to the final dissolution of it—weak at home and disregarded abroad is our present condition, and contemptible enough it is."[11]

And on seven instances, the records make clear Washington's position on particular matters.[12] Significantly, three of these dealt with the executive and in each case Washington voted in favor of an increased power and independence in the executive, an article of the nationalist faith. Thus, he favored a single rather than a plural executive, he opposed a plan providing for election of the executive by Congress and prohibiting reeligibility, and he voted against reducing from 3/4 to 2/3 the Congressional majority necessary to override a veto. In addition, it may safely be assumed that Washington's nationalist views were known generally to the other members of the Convention. Between May 30 and June 19 the Convention sat as a committee of the whole, during which time Nathaniel Gorham of Massachusetts presided, and Washington sat on the floor. It was during this period that the Convention took its most advanced nationalist positions. Of this period, Luther Martin later reported to the Maryland legislature: "The honorable Mr. Washington was then on the floor, in the same situation with the other members of the convention at large, to oppose any system he thought injurious, or to propose any alterations or amendments he thought beneficial. To these propositions, so reported by the committee, no opposition was given by that illustrious personage, or by the President of the State of Pennsylvania. They both appeared cordially to approve them, and to give them their hearty concurrence . . . ."[13]

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[9] Supra note 8 at p. 44.

[10] John Jay, Correspondence and Personal Papers, (Johnston Ed.) III, p. 239.

[11] 3 Records 51.

[12] See Farrand, George Washington in the Federal Convention, 16 Yale Review 280 (1907).

In summary, there is no room for doubt that, in Washington's view, the primary evil in the governmental system was the sovereignty of the states, and that the cure necessary was to create a national government, with increased powers and armed with some means of enforcing its supremacy.

2. *James Madison.* A descendant of one of Virginia's old landed families, Madison was a graduate of Princeton, studied but did not practice law, was a profound student of history and government, and was actively engaged in politics and public affairs throughout his life. The efforts of Madison to increase national power as a delegate to Congress under the Articles were discussed in the earlier article. His role in the political maneuvering which led to the calling of the Convention has also been noted. Madison's views of the deficiencies in the government and the measures necessary to remedy them were set forth in the months preceding the convention in letters to Washington, Randolph and Jefferson, and in a tract entitled "Vices of the Political System of the United States."

In the first place, it was essential, Madison urged, that the central government have greater power. The extent to which Madison considered this necessary is set forth in a letter to Washington in April, 1787: "I would propose next that in addition to the present federal powers, the national government should be armed with positive and complete authority in all cases which require uniformity . . . ."[14] Second, as a means of enforcing the national supremacy in the exercise of these powers, there was to be a national executive, a national judiciary, and an express declaration of the right of coercion. Third, there should be some method of protecting the national government against state interferences, and it is in his provision to achieve this goal that Madison's views of state sovereignty are clearly revealed. For his remedy was, as he wrote to Jefferson in March, 1787, "To arm the Federal head with a negative *in all cases whatsoever* on the local legislatures. . . . Without this defensive power, experience and reflection have satisfied me that however ample the Federal powers may be made, or however clearly their boundaries may be delineated on paper, they will be easily and continually baffled by the legislative authorities of the states. The effect of this provision would be not only to guard the National rights and interests against invasion, but also to restrain the states from thwarting and molesting each other and even from oppressing the minority in themselves by paper money and other unrighteous measures which favor the interests of the majority."[15] And the same proposal was set forth in his letter to Washington, supra: "Over and above this positive power, a negative *in all cases whatsoever* on the legislative acts of the states, as heretofore exercised by the kingly prerogative, appears to me to be absolutely necessary, and to be the least possible encroachment on the state jurisdictions. Without this defensive power, every positive power that can be given on paper will be evaded and defeated. The states will continue to invade the national jurisdiction, to violate treaties and the law of nations and to harass each other with rival and spiteful measures dictated by mistaken views of interest."[16] Finally, such a radical transformation in the system of government dictated the necessary method of obtaining it. "To give a new system its proper validity and energy, a ratification must be obtained from the people, and not merely from the ordinary authority of the legislatures. This will be the more essential as inroads on the existing constitutions of the states will be unavoidable."[17]

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[13] 3 Records 178.

[14] Letters and other writings of James Madison, I, p. 288 (1884).

Madison's role in the Convention was so pre-eminent that his most secure niche in history is as "the father of the Constitution." That role was as the recognized and acknowledged leader of the group which went farthest in its advocacy of a strong national government and in its derogation of the sovereignty of the states. On June 21 Madison expressed his views on the subject of national and state power in the following manner: "Mr. Madison was of opinion that there was (1.) less danger of encroachment from the general government than from the state governments (2.) that the mischief from encroachments would be less fatal if made by the former, than if made by the latter. 1. All the examples of other confederacies prove the greater tendency in such systems to anarchy than to tyranny; to a disobedience of the members than to usurpations of the federal head. Our own experience had fully illustrated this tendency. But it will be said that the proposed change in the principles and form of the union will vary the tendency, that the general government will have real and greater powers, and will be derived, in one branch at least, from the people not from the governments of the states. To give full force to this objection, let it be supposed for a moment that indefinite power should be given to the general legislature, and the states reduced to corporations dependent on the general legislature; why should it follow that the general government would take from the states any branch of their power so far as its operation was beneficial, and its continuance desirable to the people? In some of the states, particularly in Connecticut, all the townships are incorporated, and have a certain limited jurisdiction. Have the representatives of the people of the townships in the legislature of the state ever endeavored to despoil the townships of any part of their local authorty? As far as this local authority is convenient to the people they are attached to it; and their representatives chosen by and amenable to them naturally respect their attachment to this, as much as their attachment to any other right or interest. The relation of a general government to state governments is parallel.

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[15] Supra note 14, p. 285.
[16] Supra, p. 288.
[17] Supra, p. 290.

"2. Guards were more necessary against encroachments of the state governments on the general government than of the latter on the former. The great objection made against an abolition of the state governments was that the general government could not extend its care to all the minute objects which fall under the cognizance of the local jurisdictions. The objection as stated lay not against the probable abuse of the general power but against the imperfect use that could be made of it throughout so great an extent of country, and over so great a variety of objects. As far as its operation would be practicable it could not in this view be improper; as far as it would be impracticable, the conveniency of the general government itself would concur with that of the people in the maintenance of subordinate governments. Were it practicable for the general government to extend its care to every requisite object without the cooperation of the state governments, the people would not be less free as members of one great republic than as members of thirteen small ones. A citizen of Delaware was not more free than a citizen of Virginia, nor would either be more free than a citizen of America. Supposing therefore a tendency in the general government to absorb the state governments no fatal consequence could result. Taking the reverse of the supposition, that a tendency should be left in the state governments towards an independence of the general government and the gloomy consequences need not be pointed out. The imagination of them must have suggested to the states the experiment we are now making to prevent the calamity, and must have formed the chief motive with those present to undertake the arduous task."[18]

And again on June 29: "Mr. Madison agreed with Dr. Johnson, that the mixed nature of the government ought to be kept in view, but thought too much stress was laid on the rank of the states as political societies. There was a gradation, he observed, from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty. He pointed out the limitations on the sovereignty of the states, as now confederated; their laws in relation to the paramount law of the Confederacy were analogous to that of by-laws to the supreme law, within a state. Under the proposed government the powers of the states will be much farther reduced. According to the views of every member, the general government will have powers far beyond those exercised by the British parliament when the states were part of the British empire. It will in particular have the power, without the consent of the state legislatures, to levy money directly on the people themselves; and therefore not to divest such unequal portions of the people as composed the several states, of an equal voice, would subject the system to the reproaches and evils which have resulted from the vicious representation in G.B."[19]

It is obvious that nothing could be more destructive of state sovereignty than Madison's proposed Congressional negative on state laws. Intially adopted by the Convention, it was eventually dropped in favor of the supremacy clause, but Madison himself never ceased to cherish it and urge its adoption. Thus on June 8: "Mr. Madison seconded the motion. He could not but regard an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect system. Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national treaties, to infringe the rights and interests of each other; to oppress the weaker party within their respective jurisdictions. A negative was the mildest expedient that could be devised for preventing these mischiefs. The existence of such a check would prevent attempts to commit them."[20] By this time, Madison had come to regard the negative as a substitute for coercion and force in maintaining national supremacy. "Should no such precaution be engrafted, the only remedy would lie in an appeal to coercion . . . . The negative would render the use of force unnecessary. The states could of themselves then pass no operative act, any more than one branch of a legislature where there are two branches, can proceed without the other. But in order to give the negative this efficacy, it must extend to all cases. A discrimination would only be a fresh source of contention between the two authorities. In a word, to recur to the illustrations borrowed from the planetary system, this prerogative of the general government is the great prevading principle that must control the centrifugal tendency of the states; which, without it, will continually fly out of their proper orbits and destroy the order and harmony of the political system."[21]

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[18] 1 Records 356.
[19] 1 Records 463.
[20] 1 Records 164.

On July 17, Madison urged the Convention to retain the negative. "Mr. Madison considered the negative on the laws of the states as essential to the efficacy and security of the general government. The necessity of a general government proceeds from the propensity of the states to pursue their particular interests in opposition to the general interest. This propensity will continue to disturb the system, unless effectually controlled. Nothing short of a negative on their laws will control it. They can pass laws which will accomplish their injurious objects before they can be repealed by the general legislature or be set aside by the National Tribunals. Confidence cannot be put in the State Tribunals as guardians of the national authority and interests . . . . A Power of negativing the improper laws of the states is at once the most mild and certain means of preserving the harmony of the system . . . . As to sending all laws up to the national legislature, that might be rendered unnecessary by some emanation of the power into the states, so far at least, as to give a temporary effect to laws of immediate necessity."[22] On August 28 he doggedly persisted: "Mr. Madison admitted that inconveniences might arise from such a prohibition but thought on the whole it would be overbalanced by the utility of it. He conceived, however, that a negative on the State laws could alone secure the effect. Evasions might and would be devised by the ingenuity of the Legislatures . . . ."[23] And on September 12, just five days before the Convention adjourned, Madison was still true to his conviction, "Mr. Madison — There will be the same security as in other cases — The jurisdiction of the Supreme Court must be the source of redress. So far only had provisions been made by the plan against injurious acts of the States. His own opinion was, that this was insufficient, — A negative on the State laws alone could meet all the shapes which these could assume. But this had been overruled."[24]

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[21] 1 Records 164.
[22] 2 Records 27.
[23] 2 Records 440.

Like Washington, Madison recognized that, although stripped of their sovereignty, there would still be a needful and useful role for the states to play in the new system. To Washington he distilled the essence of his proposals: "Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty, and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for some middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful."[25]

Madison was instrumental in bringing about the ratification of the Constitution, both in his participation in the authorship of the Federalist Papers, and also in the Virginia convention, where he led the fight and bested the opposition of Patrick Henry and George Mason. In later years Madison became a Jeffersonian, and as the author of the Virginia Resolutions and subsequently as President, espoused the states rights strict construction approach to the Constitution. But at the time of the Convention, there is no doubt that Madison was an ardent nationalist.

3. *Edmund Randolph.* A self-styled "child of the revolution," Randolph was the son of a king's attorney who returned to England as a loyalist on the advent of the revolution. A member of Congress between 1779 and 1782, Randolph had been chairman of a committee which reported on the inadequacies of the confederation and the increased powers which were necessary. Since Virginia had taken the lead in the calling of the Convention, it was natural that she should take the initiative in submitting some proposal to commence the deliberations. It was also natural that it should be presented to the Convention by Randolph, who had been elected governor in 1786. His role in the drafting and adoption of the Constitution was an inconsistent one, from first to last. In March, 1787, he wrote to Madison that "I have turned my mind somewhat to the business of May next . . . . At present, I conceive . . . that the alterations should be grafted on the old Confederation."[26] His change of attitude in this respect he explained, after the Convention was over, as follows: "Before my departure for the convention, I believed, that the confederation was not so eminently defective, as it had been supposed. But after I had entered into a free communication with those who were best informed of the condition and interest of each state; after I had compared the intelligence derived from them with the properties which ought to

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[24] 2 Records 589.
[25] Supra note 14 at p. 287.
[26] Supra note 8 at p. 48.

characterize the government of our union, I became persuaded, that the confederation was destitute of every energy, which a Constitution of the United States ought to possess . . . ."[27]

Historians generally agree that the Randolph, or Virginia, plan which was submitted to the Convention on May 29 was largely the work of Madison. Discussion of the specific proposals included in this plan will be reserved for a later article. Suffice it to say at this point that the Virginia plan provided for a national government with virtually unlimited power over the states. Of Randolph's proposals, Yates recorded that "He candidly confessed that they were not intended for a federal government—he meant a strong consolidated union, in which the idea of states should be nearly annihilated."[28] The next day Randolph offered three motions for the purpose of establishing basic principles before considering the plan in detail. These motions were: "1. that a Union of the States merely federal will not accomplish the objects proposed by the Articles of Confederation, namely common defence, security of liberty, and general welfare. 2. that no treaty or treaties among the whole or part of the states, as individual sovereignties, would be sufficient. 3. that a *national* government ought to be established consisting of a *supreme* legislative, executive and judiciary."[29]

At the same time that he was thus proposing to destroy state sovereignty, Randolph was disclaiming any such intention. On May 30 McHenry recorded: "Mr. Randolph explains the intention of the 3rd resolution. Repeats the substance of his yesterdays observations. It is only meant to give the national government a power to defend and protect itself. To take therefore from the respective legislatures or states, no more sovereignty than is competent to this end."[30] And on May 31, "Mr. Randolph disclaimed any intention to give indefinite powers to the national legislature, declaring that he was entirely opposed to such an inroad on the state jurisdictions, and that he did not think any considerations whatever could ever change his determination. His opinion was fixed on this point."[31] While on the very same day, according to McHenry, "Mr. Randolph was of opinion that it would be impossible to define the powers and the length to which the federal legislature ought to extend just at this time."[32] But on June 16, "Mr. Randolph was not scrupulous on the point of power. When the salvation of the Republic was at stake, it would be treason to our trust, not to propose what we found necessary. He painted in strong colors, the imbecility of the existing confederacy, and the danger of delaying a substantial reform . . . . The true question is whether we shall adhere to the federal plan, or introduce the national plan. The insufficiency of the former has been fully displayed by the trial already made . . . . Congress are moreover not elected by the people, but by the legislatures who retain even a power of recall. They have therefore no will of their own, they are a mere diplomatic body, but are always obsequious to the views of the states, who are always encroaching on the authority of the United States. A provision for harmony among the states, as in trade, naturalization, etc.—for crushing rebellion whenever it may rear its crest—and for certain other general benefits, must be made . . . . A national government alone, properly constituted, will answer the purpose; and he begged it to be considered that the present is the last moment for establishing one. After this select experiment, the people will yield to despair."[33]

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[27] 3 Records 124.
[28] 1 Records 24.
[29] 1 Records 33.
[30] 1 Records 42.
[31] 1 Records 53.
[32] 1 Records 60.

On July 10, when the differences between the large states and the small states had stalled the Convention, Randolph offered certain suggestions for conciliating the small states, including the following: "3. that the people of each State ought to retain the perfect right of adopting from time to time such forms of republican Government as to them may seem best, and of making all laws not contrary to the articles of Union; subject to the supremacy of the General Government in those instances only in which that supremacy shall be expressly declared by the articles of the Union. 4. that altho' every negative given to the law of a particular State shall prevent its operation, any State may appeal to the national Judiciary against a negative; and that such negative if adjudged to be contrary to the power granted by the articles of the Union, shall be void. 5. that any individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State may resort to the National Judiciary, who may adjudge such law to be void, if found contrary to the principles of equity and justice."[34] Just how the supremacy of the central government could be limited to express instances while at the same time there was to be a national legislative and judicial authority over all state laws was not explained.

By July 17 Randolph's doubts had increased. On a motion that Congress should have the power to legislate in all cases for the general interests of the union, and also in those to which the states were separately incompetent, Randolph stated that "This is a formidable idea indeed. It involves the power of violating all the laws and constitutions of the states, and of intermeddling with their police."[35] And on September 3, "Mr. Randolph considered it as strengthening the general objection against the plan, that its definitions of the powers of the Government was so loose as to give it opportunities of usurping all the state powers."[36] And finally, when the Convention had finished its labors, Randolph refused to sign the Constitution. Although "convinced that radical changes in the system of the Union were necessary,"[37] he felt that the "republican propositions" he had submitted had been "irreconcilably departed from."[38] He specified many particulars in which he disagreed with the Constitution, and urged that the plan go to the states for proposed amendments, after which a second general Convention would be held. But, "animadverting on the indefinite and dangerous power given by the Constitution to Congress,"[39] he could not sign and thus "promote the establishment of a plan which he verily believed would end in tyranny."[40] Madison, writing to Jefferson after the Convention was over, said that "The objections of the governor turn principally on the latitude of the general powers . . ."[41]

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[33] 1 Records 255.
[34] 3 Records 56.

Reporting to the Virginia House of Delegates on his objections to the Constitution, Randolph set forth various corrections which he considered necessary. Two of these, relevant here, were "1. In causing all ambiguities of expression to be precisely explained . . . 5. In drawing a line between the powers of congress and individual States; and in defining the former, so as to leave no clashing of jurisdictions nor dangerous disputes; and to prevent the one from being swallowed up by the other, under cover of general words, and implication."[42] But in the same report Randolph stated that "I come, therefore, to the last, and perhaps only refuge in our difficulties, a consolidation of the union, as far as circumstances will permit. To fulfil this desirable object, the constitution was framed by the federal convention."[43] Inconsistent to the last, Randolph, after having refused to sign the Constitution, in the end supported its ratification in the Virginia convention. He was later Attorney General and Secretary of State under Washington, and was chief counsel for Aaron Burr when the latter was tried for treason.

4. *George Mason.* A Virginia planter and owner of 75,000 acres at his death, a speculator in Western lands who married into a merchant's family, Mason was also a Revolutionary statesman and constitutionalist. In spite of his background, Mason throughout his life was

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[35] 2 Records 26.
[36] 2 Records 488.
[37] 2 Records 560.
[38] 2 Records 561.
[39] 2 Records 631.
[40] 2 Records 564.
[41] 3 Records 135.
[42] 3 Records 127.
[43] 3 Records 124.

a defender of individual liberty and the rights of the states, basic elements of the radical philosophy. In 1773 he wrote a tract upholding Virginia's claim of sovereignty over Western lands, but he also drafted the plan whereby they were ceded to the United States. He was the framer of the Declaration of Rights in the Virginia constitutional convention of 1776, which was used by Jefferson in drafting the Declaration of Independence. He was present at the Mt. Vernon meeting in 1785, and was appointed as a delegate to, but did not attend, the Annapolis convention.

Shortly after arrival in Philadelphia and a week before the Convention started, Mason wrote to his son: "The most prevalent idea in the principal States seems to be a total alteration of the present federal system, and substituting a great national council or parliament, consisting of two branches of the legislature, founded upon the principles of equal proportionate representation, with full legislative powers upon all the subjects of the Union; and an executive: and to make the several State legislatures subordinate to the national, by giving the latter the power of a negative upon all such laws as they shall judge contrary to the interest of the federal Union. It is easy to foresee that there will be much difficulty in organizing a government upon this great scale, and at the same time reserving to the State legislatures a sufficient portion of power for promoting and securing the prosperity and happiness of their respective citizens; yet with a proper degree of coolness, liberality and candor (very rare commodities by the bye), I doubt not but it may be effected."[44]

Mason's interest in preserving the position of the states was revealed during the debate on how the Senate should be selected. Mason was very much in favor of the Senate being chosen by the respective state legislatures, and on June 7 assigned the following reasons: "Col. Mason. Whatever power may be necessary for the Natl. Govt. a certain portion must necessarily be left in the States. It is impossible for one power to pervade the extreme parts of the United States so as to carry equal justice to them. The State Legislatures also ought to have some means of defending themselves against encroachments of the Natl. Govt. In every other department we have studiously endeavored to provide for its self-defense. Shall we leave the States alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the Natl. Establishment. There is danger on both sides no doubt; but we have only seen the evils arising on the side of the State Govts. Those on the other side remain to be displayed. The example of Congress does not apply. Congress had no power to carry their acts into execution as the Natl. Govt. will have."[45] King recorded him the same day as follows "Mason—It is true that the ancient confederacies were dissolved by the overgrown power and unreasonable ambition of some one of its members, but their situation was different from that which is proposed for the United States—we have agreed that the national Legislature shall have a negative on the State Legislatures—the Danger is that the national will swallow up the State Legislatures—what will be a reasonable guard against this Danger, and operate in favor of the State authorities—The answer seems to me to be this, let the State Legislatures appoint the Senate."[46]

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[44] 3 Records 23.

On June 25, "He took this occasion to repeat that notwithstanding his solicitude to establish a national government, he never would agree to abolish the state governments or render them absolutely insignificant. They were as necessary as the Genl. Govt. and he would be equally careful to preserve them. He was aware of the difficulty of drawing the line between them, but hoped it was not insurmountable. The Convention, though comprising so many distinguished characters, could not be expected to make a faultless government. And he would prefer trusting to posterity the amendment of its defects, rather than push the experiment too far."[47]

Speaking on the same subject on June 25, Mason had this to say: "It has been agreed on all hands that an efficient Govt. is necessary, that to render it such it ought to have the faculty of self-defense, that to render its different branches effectual each of them ought to have the same power of self-defense. He did not wonder that such an agreement should have prevailed in these points. He only wondered that there should be any disagreement about the necessity of allowing the State Govts. the same self-defense. If they are to be preserved as he conceived to be essential, they certainly ought to have this power, and the only mode left of giving it to them, was by allowing them to appoint the 2d. branch of the Natl. Legislature."[48] Yates recorded him the same day: "Mr. Mason. All agree that a more efficient government is necessary. It is equally necessary to preserve the state governments, as they ought to have the means of self-defense. On the motion of Mr. Wilson, the only means they ought to have would be destroyed."[49]

On June 8 Mason voted against the Congressional negative on state laws, but it is doubtful if he was firmly committed against it. On August 23 he commented on the negative as follows: "Mr. Mason wished to know how the power was to be exercised. Are all laws whatever to be brought up? Is no road nor bridge to be established without the Sanction of the General Legislature? Is this to sit constantly in order to receive and revise the State Laws? He did not mean by these remarks to condemn the expedient, but he was apprehensive that great objections would lie against it."[50] Madison, at least, did not think Mason was opposed to the negative, as will be seen. That Mason had some idea of divided sovereignty is shown by his remark on August 20, when the question of treason was before the Convention: "Col. Mason. The United States will have a qualified sovereignty only. The individual States will retain a part of the Sovereignty. An Act may be treason against a particular State which is not so against the United States. He cited the Rebellion of Bacon in Virginia as an illustration of the doctrine."[51] And that he thought the Convention was going too far in the subordination of the states is indicated by his remark on August 21: "Col. Mason—if he were for reducing the States to mere corporations as seemed to be the tendency of some arguments, he should be for subjecting their exports as well as imports to a power of general taxation—"[52]

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[45] 1 Records 155.
[46] 1 Records 159.
[47] 1 Records 340.
[48] 1 Records 407.
[49] 1 Records 415.

On the other hand, Mason was strong for national power in two very controversial areas. On the subject of the militia, Mason on August 18 was recorded as follows: "Mr. Mason introduced the subject of regulating the militia. He thought such a power necessary to be given to the Genl. Government. He hoped there would be no standing army in time of peace, unless it might be for a few garrisons. The Militia ought therefore to be the more effectually prepared for the public defence. Thirteen States will never concur in any one system, if the disciplining of the Militia be left in their hands. If they will not give up the power over the whole, they probably will over a part as a select militia. He moved as an addition to the propositions just referred to the Committee of detail, & to be referred in like manner, ' a power to regulate the militia'."[53] The other subject was slavery, which institution Mason consistently opposed throughout his entire public career. Remembering that it was on the slavery issue that the adherents of state sovereignty later took their stand, Mason's position in the Convention is illuminating. On August 22, "He held it essential in every point of view, that the Genl. Govt. should have power to prevent the increase of slavery."[54] Madison, writing to Jefferson after the Convention was over, spoke of Mason as follows: "He did not object in general to the powers vested in the National Government, so much as to the modification. In some respects he admitted that some further powers would have improved the system. He acknowledged in particular that a negative on the State laws, and the appointment of the State Executive ought to be ingredients but supposed that the public mind would not now bear them, and that experience would hereafter produce these amendments."[55]

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[50] 2 Records 390.
[51] 2 Records 347.
[52] 2 Records 362.
[53] 2 Records 326.
[54] 2 Records 370.

Mason's position in the Convention may stand as an illustration of how far even the radicals had come by 1787 in recognizing the inadequacy of the Articles. Although he was clearly attached to what he considered states rights, it is equally clear that Mason was no defender of state sovereignty as it existed at the time, and that he recognized the necessity for a national government with increased powers. This being so, considerable significance attaches to the fact that Mason refused to sign the Constitution and opposed its ratification in Virginia. On August 31 Mason stated that "he would sooner chop off his right hand than put it to the Constitution as it now stands."[56] And on September 15 "Col. Mason seconded and followed Mr. Randolph in animadversions on the dangerous power and structure of the Government, concluding that it would end either in monarchy, or a tyrannical aristocracy; which, he was in doubt, but one or other, he was sure. This Constitution had been formed without the knowledge or idea of the people. A second Convention will know more of the sense of the people, and be able to provide a system more consonant to it. It was improper to say to the people, take this or nothing. As the Constitution now stands, he could neither give it his support or vote in Virginia; and he could not sign here what he could not support there. With the expedient of another Convention as proposed, he could sign."[57]

Specifically, Mason's objections were: "There is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declaration of Rights in the separate States are no security . . . . The Judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several states . . . . Under their own construction of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments, and extend their powers (power) as far as they shall think proper; so that the State legislatures have no security for the powers now presumed to remain to them, or the people for their rights . . . . This government will set out (commence) a moderate aristocracy; It is at present impossible to foresee whether it will, in its operation, produce a monarchy, or a corrupt, tyrannical (oppressive) aristocracy; It will most probably vibrate some years between the two, and then terminate in the one or the other."[58] Like Randolph, Mason wanted another Convention.

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[55] 3 Records 136.
[56] 2 Records 479.
[57] 2 Records 632.

5. *John Blair.* A lawyer whose father was at one time acting governor of Virginia, Blair had been in the House of Burgesses, Clerk to the Council, a delegate to the Virginia constitutional convention of 1776, and a member of the Privy Council. He then became a judge of the general court, from which he was elevated to judge of the first court of appeals of Virginia, the court of last resort. While on this court Blair, in the case of *Commonwealth v. Caton,* one of the earliest cases on the question, upheld the power of the judiciary to declare a legislative act unconstitutional. This was contrary at the time to the radical doctrine of legislative supremacy, and is significant when one recalls that it was against the doctrine and practice of judicial review that the defenders of state sovereignty later launched bitter attacks.

Blair did not make a single speech during the Convention, nor has any correspondence during the period been preserved. His only recorded action which reveals his attitude on the question of state sovereignty took place on June 8, when he voted in favor of the Congressional negative over all state laws.[59] After the Convention was over, Blair became a delegate to the Virginia convention, where he supported ratification. A Federalist, he was one of Washington's original appointments to the Supreme Court, on which he served for seven years, resigning in 1796.

During his tenure on the Court, Blair participated in two cases which involved the question of state sovereignty. One was *Penhallow v. Doane,* discussed in the earlier article, in which the Court held that, even prior to the Articles of Confederation, the power of Congress in the areas of war and foreign relations was paramount to that of the states. The other case was *Chisholm v. Georgia,* which raised the question whether the Supreme Court could assert jurisdiction over a suit against a state by citizens of other states. The Supreme Court's answer was yes, in the face of Georgia's argument that the exercise of jurisdiction by the federal courts "would effectually destroy the retained sovereignty of the states." In both of these cases Blair wrote a separate opinion upholding the result.

6. *James McClurg.* A physician, McClurg had been a surgeon in the Virginia militia during the Revolution, was later director of hospitals, professor of anatomy and medicine at William & Mary, and eventually president of the state medical society. It is ironic that McClurg became a delegate by appointment to fill the vacancy created by the

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[58] 2 Records 637-640.

[59] 1 Records 168.

refusal of Patrick Henry to attend. For, although he did not stay for the entire duration of the Convention, McClurg took nationalist positions while he was there. He was one of the early advocates of a single executive, and later moved that the term of the executive be "during good behavior" so as to render him independent of Congress. He voted in favor of the Congressional negative over all state laws, and evidently felt quite strongly on the subject, for after leaving the Convention he wrote to Madison on August 22: "I have still some hope that I shall hear from you of the reinstatement of the negative—as it is certainly the only mean by which the several legislatures can be restrained from disturbing the order and harmony of the whole, and the government rendered properly national and one. I should suppose that some of its former opponents must by this time have seen the necessity of advocating it, if they wish to support their own principles."[60]

7. *George Wythe.* A personal friend of royal Governor Fauquier, Wythe was active in Virginia colonial affairs, and was in the Continental Congress during 1775-76. He achieved his greatest renown as a judge on the Virginia high court of chancery and as a professor of law at William & Mary. While on the bench he enunciated the doctrine of judicial review, in the case of *Commonwealth v. Caton.* Wythe attended the Convention for only a few days, returning to Virginia due to the illness of his wife. No comments or correspondence concerning the Convention had been recorded. He later became a delegate to the Virginia Convention where he supported ratification.

THE NEW JERSEY DELEGATES

1. *William Paterson.* Born in Ireland, a graduate of the College of New Jersey, and a lawyer, Paterson had been a member of the New Jersey constitutional convention in 1776, and attorney general of the state from 1776 to 1783. His principle role in the Convention was as the proponent of the New Jersey plan. The Virginia plan, as submitted by Randolph, would have based representation in both houses of Congress on population, which would have given the larger states a dominant voice in the new government. It was therefore opposed by Paterson and others, who wanted equal representation and influence in the new Congress for the small states. Paterson's opposition was couched in terms of a lack of power of the Convention to depart from a system of equal representation. On June 9 he reminded the Convention that the act of Congress calling it, and the commissions of several states, limited the power of the Convention to amending the Articles. "The idea of a national government as contradistinguished from a federal one, never entered into the mind of any of them/the states/, and to the public

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[60] 3 Records 73.

mind we must accomodate ourselves. We have no power to go beyond the federal scheme, and if we had the people are not ripe for any other. We must follow the people; the people will not follow us."[61] Yates recorded him the same day as stating: "We are met here as the deputies of 13 independent, sovereign states, for federal purposes. Can we consolidate their sovereignty and form one nation, and annihilate the sovereignties of our states who have sent us here for other purposes?"[62] On June 14, therefore "Mr. Paterson, observed to the Convention that it was the wish of several deputations, particularly that of New Jersey, that further time might be allowed them to contemplate the plan reported from the Committee of the Whole, and to digest one purely federal, and contradistinguished from the reported plan."[63]

The New Jersey plan which Paterson submitted to the Convention will be considered more fully in a subsequent article. Suffice it at this point to note that it provided for a "federal" type government which, although tripartite, called for a unicameral legislature which was to represent states rather than individuals. Speaking in support of his plan, Paterson said that "If we argue the matter on the supposition that no confederacy at present exists," or "If we argue on the fact that a federal compact actually exists," in either case "it cannot be denied that all the states stand on the footing of equal sovereignty."[64] Therefore, "If the sovereignty of the states is to be maintained, the representatives must be drawn immediately from the states, not from the people; and we have no power to vary the idea of equal sovereignty."[65]

Do the foregoing statements place Paterson as a defender of state sovereignty as it existed under the Articles? That the answer is no, is readily seen. For the New Jersey plan itself contained a national supremacy section which, taken with its provisions for increased powers in Congress and for a separate executive and judiciary, would have gone a long way toward remedying the most serious inadequacies of the confederation which flowed from state sovereignty. This proposition was: "Resolved, that all acts of the United States in Congress made by virtue and in pursuance of the powers hereby and by the articles of confederation vested in them, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states so far forth as those acts or treaties shall relate to the said states or their citizens, and that the judiciary of the several states shall be bound thereby in their decisions, any thing in the respective laws of the individual states to the contrary notwithstanding; and that if any state, or any body of men in any state, shall oppose or prevent the carrying into execution of such acts or treaties, the federal executive shall be authorized to call forth the power of the confederated states, or so much thereof as may be necessary to enforce and compel an obedience to such acts, or an observance of such treaties."[66]

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[61] 1 Records 178.
[62] 1 Records 182.
[63] 1 Records 240.
[64] 1 Records 250.
[65] 1 Records 251.

That state sovereignty was not a sacred cow with Paterson is also indicated by the fact that he considered the possibility of completely obliterating the existing states. On June 9, arguing against proportional representation, he asserted that "The proposition could not be maintained whether considered in reference to us as a nation, or as a confederacy. A confederacy supposes sovereignty in the members composing it and sovereignty supposes equality. If we are to be considered as a nation, all State distinctions must be abolished, the whole must be thrown into hotchpot, and when an equal division is made, then there may be fairly an equality of representation."[67] And again on June 16 he declared that "The only expedient that will cure the difficulty, is that of throwing the States into Hotchpot. To say that this is impracticable, will not make it so. Let it be tried, and we shall see whether the Citizens of Massachusetts, Pennsylvania, and Virginia accede to it. It will be objected that Coercion will be impracticable. But will it be more so in one plan than the other? Its efficacy will depend on the quantum of power collected, not on its being drawn from the States, or from the individuals; and according to his plan it may be exerted on individuals as well as according that of Mr. R. A district executive and judiciary also were equally provided by this plan."[68] It is rather clear that these were not merely hortatory statements, made for purposes of argumentation. For one of the preliminary drafts of the New Jersey plan contains, in Paterson's own handwriting, the following remarkable provision: "Whereas it is necessary in Order to form the People of the United States of America into a Nation, that the States should be consolidated, by which means all the citizens thereof will become equally entitled to and will equally participate in the same Privileges and Rights, and in all waste, uncultivated, and back Territory and Lands; it is therefore resolved, that all the Lands contained within the Limits of each State individually, and of the United States generally be considered as constituting one Body or Mass, and be divided into thirteen or more integral Parts. Resolved, That such Divisions or integral Parts shall be styled Districts."[69]

Paterson's position thus is seen to be not one of defending state sovereignty against national supremacy, but rather of insisting on equality of state representation in whatever central government might be fashioned. Not state sovereignty with respect to the central government, but state equality with respect to other states, was his concern. This is evidenced by the fact that Paterson never opposed any of the extensive grants of power to the national government. As a matter of fact, he left the Convention after the compromise which assured equal state representation in the Senate, and did not return until the end to sign the Constitution. Writing to Ellsworth on August 23, he inquired: "What are the Convention about? When will they rise? Will they agree upon a System energetic and effectual, or will they break up without doing anything to the Purpose? Full of Disputation and noisy as the Wind, it is said, that you are afraid of the very Windows, and have a man planted under them to prevent the Secrets and Doings from flying out. The Business, however, is detailed, I hope you will not have as much Altercation upon the Detail, as there was in getting the Principles of the System . . . I wish you much Speed, and that you may be full of good Works, the first mainly for my own sake, for I dread going down again to Philadelphia—My Compliments to all your Fellow-Labourers under the same Roof—"[70] The foregoing assessment of Paterson's position is confirmed by the following extract from Bancroft; "A few days later (July 23) the number of senators for each state was fixed at two, and each of these, as had been proposed by Gerry and seconded by Sherman, was personally to have one vote. From the day when every doubt of the right of the smaller states to an equal vote in the senate was quieted, they—so I received it from the lips of Madison, and so it appears from the records—exceeded all others in zeal for granting powers to the general government. Ellsworth became one of its strongest pillars. Paterson of New Jersey was for the rest of his life a federalist of federalists."[71]

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[66] 1 Records 245.
[67] 1 Records 178.
[68] 1 Records 251.
[69] 3 Records 613.

Paterson's subsequent career supports Bancroft. After the ratification of the Constitution, Paterson became one of New Jersey's first Senators, and as such, he was a member of the Senate Judiciary Committee which reported the Judiciary Act of 1789. Section 25 of this Act, providing for Supreme Court appellate review of state court decisons on federal questions, later became one of the principal targets of the state sovereignty advocates, who tried unsuccessfully several times to repeal it. Paterson resigned in 1790 to become governor of New Jersey. He was appointed to the Supreme Court in 1795 as a Federalist, serving until his death in 1806. His view of national sovereignty in external affairs, set forth in *Penhallow v. Doane,* has been set forth in the earlier article.

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[70] 4 Records 73.
[71] 4 Records 88.

2. *David Brearly.* A lawyer, Brearly had been outspoken in favor of independence, had been a member of the New Jersey constitutional convention of 1776, and an officer in the New Jersey militia until 1779, when he became chief justice of the state supreme court. As such he decided the case of *Holmes v. Walton,* one of the early instances of judicial review over legislative enactments. During the Convention Brearly was closely associated with Paterson, naturally supporting the New Jersey plan's principle of equal state representation. Like Paterson, however, he indicated a willingness to erase existing state boundaries and make a new division in order that the problem of representation might be fairly solved.

His position on these matters was set forth in his statement of June 9: "Mr. Brearly seconds him. He was sorry, he said, that any question on this point was brought into view. It had been much agitated in Congress at the time of forming the Confederation and was then rightly settled by allowing to each sovereign State an equal vote. Otherwise the smaller States must have been destroyed instead of being saved. The substitution of a ratio, he admitted carried fairness on the face of it; but on a deeper examination was unfair and unjust. Judging of the disparity of the States by the quota of Congress Virginia would have 16 votes, and Georgia but one. A like proportion to the others will make the whole number ninety. There will be 3 large states and 10 small ones. The large States by which he meant Massachusetts, Pennsylvania and Virgnia will carry everything before them. It had been admitted, and was known to him from facts within New Jersey that where large and small counties were united into a district for electing representatives for the district, the large counties always carried their point, and consequently that the large States would do so. Virginia with her sixteen votes will be a solid column indeed, a formidable phalanx. While Georgia with her Solitary vote, and the other little States will be obliged to throw themselves constantly into the scale of some large one in order to have any weight at all. He had come to the convention with a view of being as useful as he could in giving energy and stability to the Federal Government. When the proposition for destroying the equality of votes came forward, he was astonished, he was alarmed. Is it fair then it will be asked that Georgia should have an equal vote with Virginia? He would not say it was. What remedy then? One only, that a map of the United States be spread out, that all the existing boundaries be erased, and that a new partition of the whole be made into 13 equal parts."[72]

Yates recorded Brearly as stating: "If we must have a national government, what is the remedy? Lay the map of the confederation on the table, and extinguish the present boundary lines of the respective state jurisdictions, and make a new division so that each state is equal—then a government on the present system will be just."[73] And King's notes record him as follows: "I shall be willing to take the map of the United States and divide it into 13 equal parts—this being done there may fairly be as equality in the representation of the States—"[74]Brearly signed the Constitution, supported its ratification in New Jersey, and presided over the state convention which approved it. Appointed by Washington as a United States District Judge in 1789, he died a year later.

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[72] 1 Records 176.

3. *William Livingston.* A Yale graduate and a lawyer, Livingston had two political careers. As a liberal Whig, he became a successful practitioner with considerable political influence in New York. In 1770 he moved to New Jersey, where he became a delegate to both the First and Second Continental Congress. Elected the first governor of the state in 1776, he served until his death in 1790. As governor, he opposed paper money, urged moderate treatment of loyalists and their property, and advocated revision of the Articles of Confederation. During the Convention, he supported the New Jersey plan, but made no speeches. He signed the Constitution, and was largely responsible for its speedy ratification by New Jersey.

4. *Jonathan Dayton.* At twenty-eight, Dayton was the youngest delegate to the Convention. Son of a wealthy merchant and a graduate of the College of New Jersey, he had served under his father during the Revolution and was a member of the New Jersey assembly during 1786-87. He did not arrive at the Convention until June 21; once there, he supported the principle of equal state representation in Congress. On June 30 he stated that "It should have been shown that the evils we have experienced have proceeded from the equality now objected to, and that the seeds of dissolution for the state governments are not sown in the general government."[75] Yates recorded him the same day as follows: "Captain Dayton. Declamation has been substituted for argument. Have gentlemen shown, or must we believe it, because it is said, that one of the evils of the old confederation was unequal representation? We, as distinct societies, entered into the compact. Will you now undermine the thirteen pillars that support it?"[76] On July 14 Dayton stated that "The smaller states can never give up their equality. For himself he would in no event yield that security for their rights."[77]

These statements confirm the fact that the dispute between the proponents of the Virginia and New Jersey plans was one between large and small states over proportional or equal representation, and not one over the issue of national supremacy or state sovereignty. That Dayton held no strong brief for state sovereignty is indicated by his support, on August 30, of a proposal made by John Dickinson to authorize the national government to suppress domestic violence within a state without necessity of invitation from the state. "Mr. Dayton mentioned the conduct of Rhode Island as showing the necessity of giving latitude to the power of the United States on this subject."[78] A signer and supporter of the Constitution, Dayton went to Congress as a Federalist in 1791, serving four terms, the last as Speaker of the House. During this period he consistently supported Hamilton's financial policies. He was a Senator from 1799 to 1805, during which time he voted against the attempt of the Jeffersonians to repeal the Judiciary Act of 1801. When the Republicans impeached Supreme Court Justice Samuel Chase, Dayton voted "not guilty" on all counts.

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[73] 1 Records 182.
[74] 1 Records 184.
[75] 1 Records 490.
[76] 1 Records 499.
[77] 2 Records 5.

5. *William Churchill Houston.* A graduate of the college of New Jersey, where he was a professor for five years, Houston had served two terms in the Continental Congress, had been a delegate to the Annapolis convention, and was at the time of the Convention clerk to the Supreme Court of New Jersey. He was absent from the Convention most of the time, and made no contribution of recorded consequence while he was in attendance.

THE NEW HAMPSHIRE DELEGATES

1. *John Langdon.* A wealthy merchant and shipper, Langdon had also been active in politics as a delegate to the Continental Congress in 1775, agent for continental prizes in New Hampshire throughout the war, member and twice speaker of the state legislature, and chief executive of the state. Langdon himself paid his and Gilman's expenses to the Convention, not arriving, however, until July 23. Langdon's attitude was typical of the merchant class on the question of the necessity for national, rather than state, authority in the field of commercial regulation. Writing to Tench Tilghman & Co. in April, 1784, Langdon stated that "Wish I could see better prospects in commerce, but I despair that until the several states can be prevailed upon to give up this great object (which concerns the whole) to Congress, their head; for, while thirteen different states, in thirteen different parts of the continent, undertake to regulate trade, it will not only destroy that social intercourse that ought to be cultivated between the states, but bring on the utmost confusion. However, I hope ere long we shall all see

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[78] 2 Records 467

the necessity of leaving this business to Congress, who only can, and ought to, regulate commerce."[79]

Langdon's participation in the Convention consistently placed him in favor of a strong central government. He supported the right of the national government to subdue rebellion in the states without necessity of a state request for intervention, stating on August 17 that "The apprehension of the national force will have a salutary effect in preventing insurrection."[80] He advocated the regulation and discipline of the state militias by the national government, declaring on August 18 that "Mr. Langdon seconds Genl. Pinkey's renewal. He saw no more reason to be afraid of the Genl. Govt. than of the State Govts. He was more apprehensive of the confusion of the different authorities on this subject, than of either."[81] And on August 23 he was recorded on the same subject as follows: "Mr. Langdon said he could not understand the jealousy expressed by some gentlemen. The General & State Govts. were not enemies to each other, but different institutions for the good of the people of America. As one of the people he could say, the National Govt. is mine, the State Govt. is mine—In transferring power from one to the other—I only take out of my left hand what it cannot so well use, and put it into my right hand where it can be better used."[82] Langdon also favored the Congressional negative over state laws, and made it clear that he did not consider that state sovereignty was to be a limitation on national power. "Mr. Langdon was in favor of the proposition. He considered it as resolvable into the question whether the extent of the National Constitution was to be judged of by the Genl. or the State Governments."[83] In addition, Langdon believed that representatives to Congress should be paid by the United States rather than by the states, as under the Articles; he favored prohibiting state power to levy tonnage duties; he favored giving the national government power to prohibit the slave trade; and he wished to reserve the power to admit new states of terms less than equality. He signed the Constitution, and supported its ratification in New Hampshire as a delegate to the state convention.

Langdon was a United States Senator from 1789 to 1801. At first a Federalist, he supported Hamilton's funding system and the creation of the United States bank. He subsequently became a Republican, and when Jefferson came to power in 1801, Langdon became Republican leader in New Hampshire until his retirement in 1812.

2. *Nicholas Gilman.* A politician all his life, Gilman was a vain

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[79] Quoted in 1 Bancroft 355.
[80] 2 Records 317.
[81] 2 Records 331.
[82] 2 Records 386.
[83] 2 Records 391.

self-seeker who, although a regular office-holder and associate of important people, never made any personal contribution of importance. An officer during the war, he was a delegate to Congress in 1786-88. Although he later urged ratification of the Constitution, he took no part in the debates in the Convention. He was a Federalist Congressman from 1789 to 1797, but is not recorded as being active in affairs. After the election of Jefferson, he became a Republician, and served as a United States Senator from 1804 to 1814.

[EDITOR'S NOTE: Subsequent installments of this article will appear in the May, 1959, and December, 1959, issues of the MISSISSIPPI LAW JOURNAL.]

THE MISSISSIPPI ESTATE TAX ACT

*John Stone**

Death taxes have existed in this country since 1826 when Pennsylvania enacted the first inheritance tax statute. These taxes have taken one of two forms. The statutes have either been in the nature of an inheritance tax or an estate tax. The terms "inheritance tax" and "estate tax" have been widely used in this country to simultaneously designate a system of taxes levied upon the right of succession or transmittal of property upon death.

There is an important difference, however, between these two terms.[1] An inheritance tax, strictly speaking, is a tax on the right to receive property and is measured by the share of the estate passing to each particular beneficiary; the tax varies in most states according to the relationship of the beneficiary to the deceased—the more remote the relationship the higher the tax. The estate tax, on the other hand, is levied upon the net estate of the decedent in the hands of the executor and is a tax on the right to transmit the property from the decedent's estate to the surviving donees. The identity or relationship of the beneficiary, so far as estate tax statutes are concerned, does not affect the degree of the liability—the measure of the tax being administered solely by the size of the estate.

Although several attempts had been previously made, the first real federal death tax which after enactment remained in operation was contained in the Revenue Act of 1916. Shortly after the enactment of this tax, our first statute in this State was passed in 1918,[2] and bore the general pattern of the present statute with the exception of the rate, which was definitely of inheritance tax parentage rather than on the estate tax mold. In 1922,[3] the Legislature put teeth into the law by providing stringent penalties for failure to file returns or pay taxes, including the right of the state to cite the persons guilty of such failure for contempt of court.

The law was rewritten and reenacted in 1924[4] and remained unchanged in any manner until 1956, at which time a number of changes were made for the purpose of bringing the procedure under our Statute more in line with that of the Federal Statute. The purpose of these 1956 amendments was to avoid the confusion and to remove the differences, as much as possible, between the two laws—especially in regard to the filing and procedural provisions so that those filing would be able to do so with a minimum amount of difficulty.

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[1] 21 Words and Phrases 375.

[2] Miss. Laws c. 109 (1918).

[3] Miss. Laws c. 130 (1922).

[4] Miss. Laws c. 134 (1924).

The Federal Estate Tax Statute provides a credit in favor of the states on death taxes paid to the states. This credit at one time reached the figure of 80%, but at the present time under the Internal Revenue Code of 1954, a table of federal estate tax credits allowable for state death taxes has been provided in lieu of the former 80% credit. This credit is based upon the size of the taxable estate.[5]

Unlike the Federal Estate Tax Statute, the State Statute contains no provision for a marital deduction, but on the other hand this state does not have a gift tax statute. If we were prophesying in this field, it would be our thought that neither the marital deduction nor the gift tax would appear in our statute for many years to come. Although there exists an increasing tendency for persons to take advantage of the favorable deductions and lower gift tax rates offered by the Federal Gift Tax Statute, somewhere along the line the State is going to be forced to enact a gift tax statute in order to avoid loss of estate taxes and in order to show more fairness to those who die with their money rather than giving it away—but this time certainly is not in the foreseeable future.

The 1956 amendments to the Estate Tax Statute raised the specific exemption from $50,000.00 to $60,000.00,[6] and raised the tax rate on the first $60,000.00 of the net estate from 4/5 of 1% to 1%.[7] This was the only change in the rate schedule and was made for the purpose of avoiding loss of revenue as a result of raising the specific exemption $10,000.00. It will be noted, of course, that our specific exemption is now the same as that provided in the Federal Statute. The filing dates were also brought in line with those of the Federal Statute by providing for preliminary returns to be filed within sixty days of the decedent's death or within a like time of the qualification of the executor.[8] The final return is due fifteen months after decedent's death, which is also in line with the federal provisions.[9]

The gross estate for estate tax purposes shall include the value, at the time of death, of all real and personal property, tangible and intangible, of the decedent located in this State at the time of the death of decedent—which shall include bank accounts and moneys on deposit in savings institutions.[10] This statute goes farther than most in attempting to tax intangibles which have neither the situs of the owner nor a business or commercial situs in this state, and, quite frankly, we do not know just how far the courts are prepared to go in sustaining this feature of the Statute.

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[5] 26 USCA 2011.
[6] Miss. Laws c. 413, § 6 (1956); Miss. Code Ann. §§ 9262—06 (1942).
[7] Miss. Laws c. 413, § 3 (1956); Miss. Code Ann. §§ 9262-03 (1942).
[8] Miss. Laws c. 413, § 22 (1956); Miss. Code Ann. §§ 9262-11 (1942).
[9] Miss. Laws c. 413, § 13 (1956); Miss. Code Ann. §§ 9262-13 (1942).
[10] Miss. Laws c. 413, § 4 (1956); Miss. Code Ann. §§ 9262-04 (1942).

It is becoming increasingly prevalent for husbands and wives to place their property, both real and personal, in joint tenancy, so as to avoid many of the delays and risks incident to tenancy in common. This situation is dealt with in the Statute by raising the presumption that the entire property belongs to the first decedent, and by placing the burden of proof on the one seeking to exclude such property from the estate of the decedent, to show that the property orginally belonged to the one seeking the exemption rather than ever having belonged to the decedent.[11] The proof required in such cases, for administrative purposes, usually takes the form of affidavits of those having personal knowledge of the matter, but it is conceivable that in some instances oral testimony, under oath, may be required.[12]

Our statute provides for a liberal exemption in regard to life insurance in addition to the aforementioned $60,000.00 specific exemption. The first $20,000.00 of life insurance made payable to anyone on the death of the decedent who possessed, at the time of his death, any of the incidents of ownership, is exempt from the gross estate.[13] In order to secure this exemption the insurance must be payable to a named beneficiary, and if it is payable either to the estate of the decedent or to the executor of his estate, it is not exempt in any amount. This particular provision has been the subject of some criticism as to why the estate of a decedent having insurance should be granted a greater exemption than the estate of a decedent who left no insurance. It seems very likely that this provision will someday be repealed.

Includable in the gross estate, for estate tax purposes, is any property of which a transfer has been made, or a trust created in contemplation of or intended to take effect by possession or enjoyment, at, or after, the death of the one owning the property. Also, any transfer in the nature of a final disposition made by a decedent within two years of his death, without consideration, shall be presumed to have been made in contemplation of death and the burden of proof shall be on the person administering the estate or on the beneficiaries to establish that the transfer was not so made by the decedent."[14]

In determining the net estate of a resident decedent, there shall be allowed the following deductions from the gross estate:

> Funeral and administration expenses; unpaid mortgages; losses during the settlement of the estate from fire, storms and

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[11] Miss. Code Ann. §§ 9262-04 (2) (1942).
[12] Miss. Code Ann. §§ 9262-27 (1942).
[13] Miss. Code Ann. §§ 9262-04 (e) (1942).
[14] Miss. Code Ann. §§ 9262-04 (f) (1942).

> the like when not compensated by insurance; and such amount reasonably required and actually expended for the support, during the settlement of an estate, of those dependent upon the decedent as allowed by the laws of Mississippi. This last provision has been construed to permit deduction in the amount of a widow's allowance or support for children as reflected by an order of the Chancery Court where the estate is being administered. Neither estate taxes nor income taxes upon the income received *after* the death of the decedent are allowable deductions.

There shall also be deducted from the gross estate any property upon which an estate tax has been paid within the past two years. All gifts to the State of Mississippi or any political subdivision, exclusively for public purposes, are deductible as well as gifts for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary or education purposes—in which no part of the net earnings inure to the benefit of any stockholder or individual.[15] All charitable deductions are limited to charities located within the United States or its possessions.[16]

For the purpose of determining the taxable estate of a non-resident, a deduction is permitted of the same items allowed a resident decedent's estate with the exception of charitable deductions, but these deductions are allowed only to the extent that the Mississippi property bears to the entire gross estate wherever located. Charitable deductions of non-residents are allowed only when they are to be used in this State or are contributed to charitable or educational institutions operating, at least partly, within this State.[17]

The executor of the estate of a non-resident is given the option of computing the tax in one of two ways: First, by paying on the proportion of the estate in Mississippi, which part shall be the proportion that the Mississippi property bears to the entire estate wherever located, and then taking the allowable deductions and exemptons in the same proportion, or, secondly, the non-resident may pay upon the gross estate located within Mississippi without taking any deduction whatsoever.

For a while there was a question as to whether the estate of a non-resident owed estate taxes on its Mississippi property when the gross estate was less than the specific exemption, but this doubt has now been removed by the recent Legislature. The gross estate, wherever situated, must be above the sum of $60,000.00 before any estate tax is due.[18]

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[15] Miss. Code Ann. §§ 9262-05 (1942).
[16] H. B. 164, Miss. Laws (1958).
[17] Miss. Code Ann. §§ 9262-08 (1942).
[18] H.B. 189, Miss Laws (1958).

One may wonder why we have this second method of computing he tax, but the executors of large estates which extend into several tates frequently prefer this method when the holdings in the state are very small. It is a quick, and often convenient, way to get rid of the ax liability in at least one state.

In the event no estate tax return is filed, the Commissioner is given a period of ten years from the due date of the return to investigate the estate and assess the taxes. In case a return is filed, the Commissioner is given a period of four years to make such an investigation. If the executor shall furnish the Commissioner with a statement from the Bureau of Internal Revenue that the values set in the return have been accepted by the Bureau, or if they have been changed, and payment is made to the state on these changed values, the Commission may give a final receipt. Values fixed by the Bureau of Internal Revenue are prima facie correct.[19] Immediate notification of the Bureau's final action in regard to its valuation of the property of the estate will expedite closing the file by the State Tax Commission. It has been found from experience that following the valuation of the Bureau saves the state considerable money in investigation and also synchronizes the valuation procedure between the state and federal government. It should be borne in mind that because of the marital deduction allowed by the Federal Statute, there are some estates which do not owe the federal tax but will owe the state tax. These estates are thoroughly investigated by the State Tax Commission before a final receipt is given.

In regard to the valuation of property, some taxpayers are under the misapprehension that assessed values are determinative for estate tax purposes. In assessing the tax every effort is made to ascertain the actual value of the property at time of death and the assessed values for ad valorem tax purposes furnish little or no help in this respect.

From time to time inquiries are made concerning the issuance of waivers of tax liens—sometimes on the entire estate, but most frequently on stock certificates or tangible personal property. The lien for the tax when a return has been filed shall be for a period of four years, and when no return is filed, for a period of ten years. But, if the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may issue his certificate or waiver releasing any or all property from the lien imposed.[20]

As a practical matter, if a waiver is desired, a written request is made stating: the name of the former owner, the address at time of death, and a description of the property on which the waiver is desired. An estimate of the amount of the tax due on this particular property is then made, and upon the payment of this amount of tax, which is credited against the final liability, the waiver is issued. No charge is made for these waivers if any tax is paid, but in the event no tax is due, waivers are issued upon the payment of a fee of $1.00 regardless of the number of waivers involved. Incidentally, an executor who pays any debts of an estate without first paying the estate tax is personally liable therefor,[21] and no final accounting of an executor shall be allowed by any court unless the judge finds that all estate taxes have been paid.[22]

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[19] Miss. Code Ann. §§ 9262-16 (1942).
[20] Miss. Code Ann. §§ 9262-19 (1942).

Interest upon delinquent payments accrue at the rate of ½ of 1% per month,[23] and this is true even though an extension for filing has been granted. In no case may interest be waived. There are various provisions in the Statute for penalties. In case of negligent failure to pay the correct amount of tax, a 10% penalty may be assessed upon the deficiency.[24] In case of failure to pay within thirty days after demand when no return has been filed, penalties in the amount of 50% with interest at 1% per month may be assessed.[25] There are also provisions for criminal penalties in certain instances, particularly in regard to perjury and failure to supply information.[26]

If the executor is dissatisfied with the assessment against the estate, he may request a hearing before the Commissioner, and in event the Commissioner decides against his position, he has a right of appeal to the entire Commission, and from there to the Chancery Court of Hinds County, from this Court, of course, he has the right to appeal to the Supreme Court of Mississippi. On appeal from the Commission to the Chancery Court the trial afforded is de novo. The burden of proof is on the taxpayer, however, since he is the appellant. Contrary to the usual requirement of a bond in double the amount of tax involved as a prerequisite of an appeal, this Statute requires an appeal bond only in the amount of the tax involved, additional tax, interest and penalties, if any, and estimated court costs. If the taxpayer is unsuccessful in the Chancery Court, he may appeal to the Supreme Court by using the same bond, provided that the Chancery Court will enter an order to that effect.

An executor may, if he so desires in appealing from an order of the Commission, pay the tax found due and sue for a refund thereof either in the Chancery Court of Hinds County or the county in which the estate is being administered. If this course is followed, a bond for ourt costs in the sum of at least $500.00 is all that is required.[27]

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[21] Miss. Code Ann. §§ 9262-22 (1942).
[22] Miss. Code Ann. §§ 9262-22 (1942).
[23] Miss. Code Ann. §§ 9262-23 (1942).
[24] Miss. Code Ann. §§ 9262-23 (1942).
[25] Miss. Code Ann. §§ 9262-24 (1942).
[26] Miss. Code Ann. §§ 9262-25 (1942).

Hearings before the Tax Commission are very informal. A taxayer desiring a hearing makes written request in letter form; the easons therefor may or may not be assigned as the taxpayer desires. A hort time after request is made, a setting will be determined and the axpayer notified thereof in writing. At the hearing there may be everal administrative personnel of the Commission present who have een instrumental in making the assessment. As a general rule no one s put under oath, and everyone is given ample opportunity to present is views—not infrequently with several persons doing so at the same ime. Whatever decisions the Commission reaches, the taxpayers will be otified by being sent a certified copy of the Commission's Order enered in the case.

There have been very few court decisions under the estate tax tatutes.

A short time after the enactment of the 1922 Statute, the court had occasion to pass upon the constitutionality of the Estate Tax Statute, which it upheld, along with the right of the Legislature to make a classification of taxpayers on the basis of their being either residents or non-residents of the State of Mississippi as distinguished from citizens or noncitizens. The court also held the estate tax to be an excise and not an ad valorem tax, even though the value of the property enters into the amount of the tax which is ultimately due. This tax, however, is not one on property, but on the right to transmit property, therefore, there is no violation of Section 112 of the Mississippi Constitution which requires that all taxation of property shall be uniform throughout the state and shall be taxed in accordance with its value.[28]

In another case the court held that an estate tax accrues and becomes fixed as of the date of the death of the decedent, and the value of the property is to be determined for inheritance tax purposes as of that date.[29]

The federal statutes give the taxpayer the option of valuing the property either as of the date of the death or as of a date one year after decedent's death.[30] Although the Tax Commission attempts to follow the Bureau of Internal Revenue in its valuation of property, it does not grant this option, but values property as of the date of death rather than one year therefrom.

There have been two cases before the court involving the question of charitable deductions. In the first case the court held that the charitable gifts of a resident are deductible from the gross estate whether said charities are made payable to a resident or non-resident charity.[31]

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[27] Miss. Code Ann. §§ 9262-27 (1942).

[28] Enochs v. State, 133 Miss. 107, 97 So. 534 (1923).

[29] Hodges v. Inman, 149 Miss. 785, 115 So. 893 (1928).

[30] 26 USCA 2032.

In the second case, which involved the charitable bequests of a non-resident, the court held that the non-resident was entitled to a deduction based upon the proportion which the Mississippi property bore to the entire estate and this was true regardless of the fact that charitable bequests were made to non-resident charities.[32]

The 1956 Legislature changed the statute in regard to charitable deductions for non-residents and limited those deductions to charitable gifts made to charitable organizations operating in whole or in part within this state.[33]

Much progress has been made within recent years toward synchronizing our Statute with the federal statutes and federal procedure; in fact, one of the latest amendments provides that this shall be the case. But, in the area involving the situs of property and the right of the state to tax this property as part of the estate of a decedent, particularly in regard to the situs of intangibles, it is not known what position the court will take. Our Statute attempts to tax intangibles when they have left the stream of interstate commerce and have come to rest within the state, regardless of their business or commercial situs and regardless of the domicile of the owner—by the same token it attempts to exempt intangibles of the resident when they are physically located without the state so long as they are not in a transitory status. It is thought that the protection offered by the state to these intangibles, which have actually come to rest therein, is a sufficient hold by the state to exact the tax. Certainly the state ought to have the right to demand a quid pro quo.

Those filing estate tax returns should keep in mind that the 14% surtax is no longer in effect. It expired on June 30, 1958, but since this tax accrues at the the time of death it is still due on all estates in which the decedent died before that date.[35]

The 1956 amendments were, in a large measure, recommended to the Legislature after conference with the Tax Committee of the State Bar Association, and this Committee deserves much credit for helping to modernize these statutes.

It is felt that it will be necessary over a period of time to continually amend these statutes so as to make their operation fairer to both the taxpayer and to the state than is true even at the present time.

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[31] First National Bank of Memphis v. State Tax Commission, 210 Miss. 590, 50 So. 2d 146 (1951).

[32] State Tax Commission v. Jennings, 92 So. 2d 361 (Miss. 1957).

[33] Miss. Code Ann. §§ 9262-08 (1942).

[34] Miss. Code Ann. §§ 9262-08 (1942).

[35] Miss. Laws c. 410 (1956).

It has been suggested that under the President's proposal for certain tax sources to be turned over to the states, the field of death taxes is one which particularly lends itself thereto, since historically the states have always controlled the administration of the estate of its deceased citizens.[36] When and if this remote possibility ever comes to pass, certainly the State will, of necessity, review its entire position in regard to death taxes and, of course, will have to abandon the statutory ties which it now has with the federal statutes. Such action will conceivably open up a field of more revenue than is now being realized by the state, but by the same token with the federal aid in administration gone, the cost of collecting the tax will be greatly increased.

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[36] Dane, "A Larger Federal Estate Tax Credit," Taxes (The Tax Magazine 1958).

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Student Comments

SUBSTANTIAL BORROWING V. FAIR USE, OR, SPOOF WITH CAUTION*

I. INTRODUCTION

This is a consideration of the now famous *Benny* case which was finally decided on March 17, 1958, when the United States Supreme Court in a Per Curiam decision[1] by an equally divided court, affirmed the prior judgment thereby answering the much discussed issue of whether a charge of copyright infringement, where the defendant took a substantial part of the copyrighted work, was defeated by the fact that the appropriated material was used as part of a burlesque or parody of the copyright work; or, is a burlesque of a substantial part of a copyrighted work a fair use in spite of the substantial taking?[2] These decisions hold that a substantial taking or copying is infringement.

II. BACKGROUND

As background material, let us first consider the factual situation leading to the Supreme Court decision. In 1939, one Hamilton received a British copyright for his original play entitled "Gaslight." In 1941, he received a copyright in the United States. In 1942, the exclusive motion picture rights of "Gaslight" were acquired by Loew's Incorporated and an original motion picture was produced; Loew's securing a valid copyright on the motion picture in 1944. Some five years after the picture was withdrawn from domestic release, Columbia Broadcasting System wrote and produced a burlesque of "Gaslight" which was broadcast over television. Three days later the Columbia Broadcasting System was notified by Loew's that it considered its copyright infringed. Loew's was informed by the Columbia Broadcasting System that the latter's counsel considered this a fair use of the film. A year later, in 1953, Loew's commenced this action in the United States District Court for the Southern District of California and a restraining order was issued pending a final determination, the film, soundtrack, etc., having been confiscated by the court. The court, Judge Carter, found that there was substantial copying, that the part copied was a substantial part of the copyrighted material, that there had been an infringement, and granted injunctive relief sought.[3]

In 1956, the decision was appealed to the United States Court of Appeals, Ninth Circuit, which likewise held that an infringement existed, stating that a serious work copied practically verbatim, and then presented as a burlesque could not avoid infringement by a claim of fair use.[4]

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*This article was the prize-winning paper in the 1958 Nathan Burkan Memorial Competition at the University of Mississippi, sponsored by the American Society of Composers, Authors and Publishers.

[1] Columbia Broadcasting System, Inc. v. Loew's, Inc., 356 U.S. 43 (1958).

[2] Loew's, Inc. v. Columbia Broadcasting System, Inc., 131 F. Supp. 165 (S.D. Cal. 1955).

[3] See note 2 supra.

Meanwhile, Judge Carter was undergoing some changes of mind in a similar case, where comedian Sid Caesar had burlesqued a Columbia Pictures Corporation copyrighted motion picture "From Here to Eternity," without their consent and on television. The court here apparently modified its earlier decision somewhat by saying that the law allowed more extensive use of the protectible material in the creation of burlesque than in the creation of other works.[5]

In 1957, with these somewhat inconsistent decisions as a backdrop, the *Benny* case was presented to the United States Supreme Court by petition for certiorari; the writ having been granted,[6] the question mentioned in the begining came before this latter court for the first time on March 17, 1958.

A determination of what constitutes infringement, how much of the copyrighted material may be used, what is substantial copying and what is fair use are questions that have harrowed the courts for some time.

Though this introductory material has concededly been more ably produced in separate articles on copyright infringement[7] and fair use,[8] this writer proposes that for a better understanding of a problem such as is here considered, and in the writing of an article of this nature, it is necessary to give a historical summary and development of the subject matter leading to the present point of interest in order that the average reader, unfamiliar with the subject, may have a proper understanding of the article. The purpose is to show the basis for the decision through a consideration of the historical development of the law of copyright; the rights arising under the law; what constitutes infringement and with emphasis on the rights of the users, other than the owner, of copyrighted materials; how far this right extends and what bases are used to make such a determination.

A. Statutes and Constitution

The right of an author to his own productions and to control their publication was recognized at common law, with the Statute of Queen Anne apparently being the first Copyright Act giving to the author the necessary reward for his labors in the form of protection in the exclusive publication of works for certain periods of time.[9] Although the law of copyright is comparatively young,[10] its adoption has long been recognized as a necessity.[11]

Our founding fathers recognized the need for providing incentive to the creator of literary works in the Constitution of the United

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[4] Benny v. Loew's, Inc., 239 F. 2d 532 (9th Cir. 1956).

[5] Columbia Pictures Corp. v. National Broadcasting Co., Inc., 137 F. Supp. 348 (S.D. Cal. 1955).

[6] Columbia Broadcasting System, Inc. v. Loew's Inc., 353 U.S. 946 (1957).

[7] Peck, Copyright-Infringement of Literary Works—An Elemental Analysis, 38 Marq. L. Rev. 180 (1954).

[8] Yankwich, What is Fair Use? 22 U. Chi. L. Rev. 203 (1954).

[9] Holmes v. Hurst, 174 U.S. 82 (1899).

[10] 18 C.J.S., Copyright and Literary Property § 17 (1939).

[11] See note 7 supra.

States.[12] This provision grants to Congress the power "(t) o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Pursuant to this authorization, the Copyright Act[13] was passed granting to authors and publishers valuable and enforceable rights, without burdensome requirements, in order to encourage the advancement of literary works of lasting benefit to the world.[14] This law secures to the owner who has complied with the statute, the exclusive right to "print, reprint, publish, copy and vend the copyrighted work,"[15] the protection extending to and including "all the copyrightable component parts of the work."[16]

Broadly speaking then, the owner of a literary work has the exclusive right to use it or authorize others to use it, and he may, by the same token, prevent its use in any manner by anyone without his consent.[17]

This does not necessarily mean that every part of the work is reserved to his exclusive use and control, but it does cover the work as an entirety, including any substantial or material part thereof. It is readily seen that the basis for the grant of power to Congress was the advancement of science and the useful arts, that the copyright law makes reward to the owner a secondary consideration;[18] thus by deduction we find that the information conveyed by a copyrighted property is not subject to copyright, but only the literary or artistic expression contained therein.[19]

Continuing to trace our thesis, we discover that the protection afforded by a copyright is not exclusive, as is that afforded by a patent,[20] but contemplates and permits fair use of the copyrighted property by all persons.[21] While recognizing in the author a right to certain protection under the statute, the courts generally accept the true value of the publication as that public right to the dissemination of the information contained therein, thus refusing to permit the author to thwart the copyright law by withdrawing certain ideas or conceptions of the copyrighted material from the stock of materials usable by others and by so doing, narrowing the "field of thought open for development."[22]

Though these various statements by the courts regarding the rights of the owner versus the user furnish a broad line of demarcation, there is general recognition of the necessity of leaving it "to the discretion of the courts to determine how far the protection of copyright should go."[23] This determination is made when a remedy is sought by the owner of a copyright for the infringement of his rights, and depends necessarily, upon the particular circumstances of each case.[24]

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[12] U. S. Const. art. I, § 8.

[13] 17 U.S.C. § (1947) (later amended by 66 Stat. 752 (1952)).

[14] Washingtonian Pub. Co., v. Pearson, 306 U.S. 30 (1939).

[15] See note 5 supra.

[16] Id. § 2.

[17] Annot., 23 A.L.R. 2d 248 (1952).

[18] Mazier v. Stein, 347 U.S. 201 (1954); United States v. Paramount Pictures, 334 U.S. 131 (1948).

[19] Warner Bros. Pictures v. Columbia Broadcasting System, 162 F. Supp. 141 (S.D. Cal. 1951).

[20] Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908).

[21] Eichel v. Marcin, 241 Fed. 404 (S.D. N.Y. 1913).

[22] Becker v. Loew's, Inc., 133 F. 2d 889 (7th Cir. 1943).

B. Infringement

The Copyright Act does not define "infringement" but it has been held to be "a trespass on a private domain owned and occupied by the owner of the copyright, and, therefore, protected by law,"[25] i. e., the going beyond the boundaries of permissible usage into the realm of that which the sole right to do is conferred by the statute upon the owner of the copyright.[26] The degree of protection afforded the author is then best measured by the elements constituting infringement; those elements which must be shown to exist before infringement can be proven. Though not universally recognized, the following elements are generally considered by the American courts in suits for copyright infringement either in part or in toto.[27]

First, there must necessarily be an existing or previous work to be infringed, which must be shown to have existed prior to the claimed infringement. Since only copyrighted materials can be infringed under the statute, it may be assumed that the requirement of physical form and expression will have been met.

Second, after establishing the existence of previous work, it must be shown to be "literary property" which is simply a general term describing the interest of the owner in the property, "whether before or after publication, or before or after copyright;" it includes common law rights.[28]

Third, when a previous work containing literary property is proven, there may be substantial similarity shown to assist in the proof of access and copying,[29] though a "mere similarity" is not sufficient proof of access and piracy,[30] or even an identical work if it is an original and independent production.[31]

Fourth, proof of access is a prerequisite to proof of copying and unless there is copying or appropriation, there can be no infringement. However, an admission of proof of defendant's access to the copyrighted work is insufficient proof of copying. The showing of access merely shows opportunity and not that use was actually made of this opportunity.[32] Where there is no admission or direct proof, access may be proved by circumstantial evidence[33] and the reasonable inferences which may be drawn therefrom,[34] recognizing that there will seldom be direct evidence of copying.

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[23] See note 2 supra.

[24] Simms v. Stanton, 75 Fed. 6 (N.D. Cal. 1896).

[25] Sheldon v. Metro-Goldwyn Pictures Corp., 7 F. Supp. 837 (S.D. N.Y. 1934).

[26] See note 12 supra.

[27] See note 3 supra.

[28] 18 C.J.S., Copyright and Literary Property § 3 (1939).

[29] Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947).

[30] Allen v. Walt Disney Productions, Ltd., 41 F. Supp. 134 (S.D.N.Y. 1941).

[31] Harold Lloyd Corp. v. Witwer, 65 F. 2d 1 (9th Cir. 1933).

[32] Arnstein v. Porter, 154 F. 2d 464 (2nd Cir. 1946); Kustoff v. Chaplan, 120 F. 2d 551 (9th Cir. 1941).

[33] Kovacs v. Mutual Broadcasting System, 99 Cal. App. 2d 56, 221 P. 2d 108 (1950).

Fifth, that there can be no infringement without copying, either directly or indirectly, in whole or in part, that which is copyrighted is well recognized,[35] and it is only where the similarity or identity is due to an actual copying of the copyrighted work that there is an infringement.[36] As was shown above, the protection afforded a copyright is not exclusive as is that of a patent, so that there may be two or more works on the same subject, similar, or even identical to one another without a deprivation of the protection of the statute. If there is originality, which is the requirement of the statute,[37] and each work is the outgrowth of independent effort, each is entitled to be copyrighted.[38]

"Copying" as evidenced by the application of the rules, is a word of rather "elastic" meaning.[39] Copying has been defined as the reproduction of "some substantial and material part" of the original,[40] "as distinguished from an independent production of the same thing,"[41] and a "copy" as "that which comes so near to the original as to give to every person seeing it the idea created by the original."[42]

Some courts prefer to use different language, stating that there must be an "appropriation" of all or some part of the protected work to constitute infringement.[43]

Whatever the language used, it is well established that there need not be a literal reproduction of the work, or of a substantial part thereof, to constitute copying in the degree required to become infringement.[44] Colorable alteration, or indirect copying or reproduction from memory may be sufficient;[45] and in the extreme, copying a piracy has been held to be an infringement of the original;[46] the infringing party, having copied at his peril, lost his defense of indirect copying or ignorance.[47]

Copying may be proven by direct evidence, or may be inferred from the surrounding circumstances,[48] so that a charge of infringement does not fail because the defendant was not "caught in the act;"[49] however, where circumstantial evidence is relied upon, the similarities which give rise to the copying, must be "quite substantial;"[50] and such similarities must be so pronounced as to establish piracy with "reasonable certainty."[51] Where evidence of access is absent, access generally constituting a part of the circumstantial evidence, "similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result."[52] The question always, of whether similarities are sufficient to satisfy an inference of copying, is necessarily one of fact.[53]

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[34] Golding v. R. K. O. Pictures, 35 Cal. 2d 690, 221 P. 2d 95 (1950).

[35] Affiliated Enterprises, Inc. v. Gruber, 86 F. 2d 958 (1st Cir. 1936); see note 2 supra.

[36] See note 2 supra.

[37] Fred Fisher, Inc. v. Dillingham, 298 Fed. 145 (S.D.N.Y. 1924.

[38] See note 2 supra; Stevenson v. Harris, 238 Fed. 432 (S.D.N.Y. 1917).

[39] Annot., A.L.R. 2d 248 (1952).

[40] Wilson v. Haber Bros., Inc., 275 Fed. 346 (2nd Cir. 1921).

[41] 18 C.J.S., Copyright and Literary Property § 94 (a) (1939).

[42] See note 2 supra.

[43] Arnstein v. Porter, 154 F. 2d 464 (2nd Cir. 1946); De Montijov v. 20th Century-Fox Film Corp., 40 F. Supp. 133 (S.D. Cal. 1941); Rush v. Ourster, 39 F. 2d 468 (S.D.N.Y. 1930).

[44] Twentieth Century-Fox Film Corp. v. Stanesifer, 140 F. 2d 579 (9th Cir. 1940); Nichols v. Universal Pictures Corp., 45 F. 2d 119 (2nd Cir. 1930).

[45] 18 C.J.S., Copyright and Literary Property § 94 (c) (1) (1939).

[46] Stevenson v. Fox, 226 Fed. 990 (S.D.N.Y. 1915).

[47] American Press Ass'n. v. Daily Story Publishing Co., 120 Fed. 766 (7th Cir. 1902).

[48] See note 22 supra.

[49] Wikie v. Santly Bros., Inc., 91 F. 2d 978 (2nd Cir. 1937).

Sixth, intention to infringe the copyrighted work has been held not essential under the Copyright Act,[54] so that unconscious plagiarism,[55] ignorance,[56] or honest intention,[57] do not defeat the cause of action for infringement. However, where questions of fair use arise, intention may have a bearing on whether the use was fair or unfair.[58] In considering circumstantial evidence, intent to copy is an important factor,[59] and becomes quite important where there is an attempt to recover damages for the infringement.[60]

Seventh, originality is the essence of the protection intended under the Copyright Act,[61] so it necessarily is essential as a basis of any action for copyright infringement.[62] Apparently that which is original but which belongs to the public domain, i.e., "unprotected literary works," or that which "belongs to the public at large" are not subject to copyright and may be used by anyone at anytime. Because a copyright is not conclusive evidence of originality, thus requiring an independent determination of what is original in each instance, "originality is probably the most frequently contested element in an action for infringement."[63]

Eighth, proof of damages is not an essential element in a suit for infringement inasmuch as the Copyright Act gives to the court discretion in giving actual damages or "such damages as to the court shall appear to be just;"[64] however, to recover "actual damages" there must be a showing of what those damages are.

C. Fair Use

Up to this point we have been primarily interested in a discussion of the beginning of copyright, its purposes and what constituted an infringement of the copyrighted material, with special emphasis on copying or appropriation. Our attention has been directed to a conclusion that not all copying constitutes infringement by the fact that, as opposed to a patent, the copyright does not give exclusive rights of use to the owner thereof. Following this line of reasoning, Ball writes that:

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[50] See note 31 supra.

[51] See note 22 supra; Christie v. Harris, 47 F. Supp. 39 (D.C.N.Y. 1942).

[52] Arnstein v. Porter, 154 F. 2d 464 (2nd Cir. 1946).

[53] See note 12 supra; see note 25 supra; see note 21 supra.

[54] Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931); Metro Associated Services v. Webster City Graphic, Inc., 117 F. Supp. 224 (N.D. Iowa 1953).

[55] Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. 2d 49 (2nd Cir. 1936).

[56] See note 39 supra.

[57] See note 2 supra.

[58] 18 C.J.S., Copyright and Literary Property § 95 (1939).

[59] See note 2 supra; Northern Music Corp., v. King Record Distributing Co., 105 F. Supp. 393 (S.D.N.Y. 1952).

[60] 17 U.S.C. 101 (b) (1947).

[61] Stein v. Mazer, 204 F. 2d 472 (4th Cir. 1953).

[62] Lewis v. Kroger Co., 109 F. Supp. 484 (S.D. W.Va. 1952).

[63] 17 U.S.C. § 8 (1947); Driscoll, Copyright Infringement, 11 Fordham L. Rev. 63 (1942); see note 3 supra.

[64] See note 51 supra.

> "A copyright contemplates and impliedly authorizes a fair use of the copyrighted work by all persons, as a means of accomplishing the broad purpose of disseminating learning to promote the progress of science and useful arts."[65]

Exactly what is fair use? The doctrine of fair use necessarily derives its meaning from the decisions—there being no provision for "fair use" of the copyrighted work in the American Act. It has been defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner of the copyright."[66] The courts seem to justify "fair use" as a "reasonable use" of the copyrighted work based on an implication of its necessity in order to comply with the constitutional policy of promoting "the progress of science and the useful arts," for to permit a withdrawal of all copyrighted works from the field of endeavour would tend to frustrate all would be authors or originators to the point that their incentive to further the progress sought would be destroyed.[67] That the right of fair use exists is not to be disputed, but general statements as to what and where it is must be reduced to the specifics in each instance in order to understand and define the extent and application of the right.[68]

The line of demarcation between what is fair and what is unfair use is no doubt thin and difficult to perceive, but nevertheless, it must be found in this line of cases. Some considerations which are dependent upon the particular circumstances of each case are the quantity and quality or value of the matter copied, the proportion of the defendant's work formed by the matter copied, and the competitive character of the two works.[69] One test of fair use includes: "(1) The extent and relative value of the extracts; (2) the purpose and whether the quoted portions might be used as a substitute for the original work; (3) the effect upon the distribution and objects of the original work."[70]

The scope given to fair use varies from the broad scope in the field of fine arts and science, where the writer "invites reviews, comments and criticism," and where the law allows those working in the field to use the ideas, opinions, or theories and even the exact words of the copyrighted material, to the narrowed fields where "business competition" exists and where fair use becomes difficult to distinguish from the unfair.[71] It seems to be a proper conclusion that in arriving at a determination of the extent of fair use, a "broader scope will be permitted the doctrine where the field of learning is concerned and a much narrower scope where the taking is solely for commercial gain."[72]

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[65] Ball, Law of Copyright and Literary Property § 11 (1944).

[66] Id. § 125.

[67] Eichel v. Marcin, 241 Fed. 404 (S.D. N.Y. 1913); Ball, op. cit. supra note 57, at 260.

[68] Loew's Incorporated v. Columbia Broadcasting System, 131 F. Supp. 165 (S.D.Cal. 1955).

[69] See note 16 supra; see 18 C.J.S., Copyright and Literary Property § 94(c)(4) (1939).

[70] Shapiro, Bernstein & Co. v. P. F. Collier & Son Co., 26 U.S.P.Q. 40 (S.D. N.Y. 1934).

Whatever the field of endeavour may be, infringement cannot be avoided by a claim of fair use, based on the purpose or manner of appropriation, where there is a showing of substantial taking.[73]

According to Ball, and the earlier cases, a burlesque or parody of the original did not constitute an infringement where a "few lines" were reproduced; however, on the other hand, to amount to an infringement there had to be such reproduction as to cause a material reduction in the demand for the original, that such exceeded fair criticism because it injuriously affects the copyright owners rights to a "substantial" extent.[74] There appears to be an area of darkness within the above, and within this area may be where the *Benny* and *Caesar* cases lie. There is a vast difference between copying a few lines and substantially injuring the copyright owner's right through a reduction in the demand for his original. Admittedly the Benny faction "took" more than a few lines, but could they possibly have reduced the demand for a product that had not been available to the market for some five years?

In the *Caesar* case,[75] Judge Carter listed the following as materials ordinarily appearing in a copyrighted work that is not capable of ownership and thus not protected. They are: (a) the title; (b) the theme; (c) the locale and settings; (d) the situations; (e) ordinarily the characters; (f) the ideas; and (g) the bare basic plot. In each listing, authority is given. In the very next paragraph he states that the protectible property is limited to the "development, treatment and expression given in the copyrighted work to such elements," citing case authority.[76]

We have seen that the doctrine of fair use permits a use of the protectible material without liability if within certain limitations. We have seen, in the tests for fair use, the elements of quantity, quality or value of that taken, the purpose for which taken and the effect of the taking and redistribution. "The purpose for which the use was made is of major importance."[77] Consider this with *Bloom & Hamlin v. Nixon*,[78] there being no infringement where the purpose was to use the chorus of a song as a vehicle for defendant's mimicry. Again in *Green v.*

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[71] Thompson v. Gernsback, 94 F. Supp. 453 (S.D. N.Y. 1950 ; Sampson & Murdock Co. v. Seaver-Radford Co., 140 Fed. 539 (1st Cir. 1905); Yankwich, What is Fair Use?, 22 U. Chi. L. Rev. 203 (1954); see note 59 supra.

[72] See note 59 supra.

[73] See note 59 supra.

[74] Bloom & Hamlin v. Nixon, 125 Fed. 977 (C.C.E.D. Penn. 1903); Hill v. Whalen & Martell, 220 Fed. 359 (S.D. N.Y. 1914): Ball, Law of Copyright and Literary Property § 137 (1944).

[75] 137 F. Supp. 348 (1955).

[76] Dymow v. Bolton, 11 F. 2d 690 (2nd Cir. 1926); Roe-Lawton v. Hal E. Roach Studios, 18 F. 2d 126 (S.D. Cal. 1927); Eichel v. Marcin, 241 Fed. 404 (S.D. N.Y. 1913).

[77] See note 68 supra.

[78] 125 Fed. 977 (E.D. Pa. 1903).

Minzensheimer,[79] the court held for defendant saying that the purpose of the song was to provide a vehicle for defendants impersonations, that being the manner in which she derives her popularity. Opposed to the *Minzensheimer* decision is *Green v. Luby*,[80] involving practically the same situation except that defendant sang the entire song. The court distinguished *Bloom* and *Minzensheimer* on the basis of quantity, implying that the entire copyrighted song was not necessary to a fulfillment of the purpose for which sung, i.e., mimicry. The first impression is that that part necessary to accomplish the purpose of the use, provided this part is less than all, is permissible—thus leaving the determination of what is permissible as fair use dependent upon purpose.

By taking certain elements and by applying certain tests, the courts and textwriters have attempted to set forth rules as to what constitutes fair use, from the defendants' point of view. On the other hand, these same courts and textwriters have attempted to set forth rules as to what constitutes substantial taking. Whether looking for fair use or substantial taking, all courts and textwriters agree that the result depends entirely upon the circumstances of each particular case.

Ball defines unfair use as the adoption, to a substantial extent, of the copyright owner's "arrangements, methods of illustration and plan of presenting the subject" in order to save himself the time, labor and expense of doing what the originator has already done.[81]

III. Conclusion

It is submitted that Judge Carter was on the proper path to a determination of whether there had been a fair usage in the *Benny* case when he spoke of purpose as of major importance, but that he was sidetracked by the confused theory of substantial taking. It is also submitted that in cases raising this issue in the future, there should be a consideration of the purpose first in order to arrive at substantiality, that the rule of the *Bloom* and *Minzensheimer* cases should be followed, and if there is a showing of good faith on the part of the taker, a taking of less than the whole, coupled with a failure of the elements of unfair use as shown above, then there can be no unfair use and no infringement.

Applied to the *Benny* case it might look like this: (a) The purpose of taking was to provide a vehicle by which Benny could advance his popularity and reputation as a dead pan comic, strictly in good faith. Benny's reputation is his method of presentation, not his subject matter; (b) there was a taking of less than the whole (some fifteen minutes of a full length movie); (c) there was no substantial taking because that taken was "necessary"[82] to effectuate the purpose for which taken; (d) nor was there substantial adoption of the original producer's arrangements, methods of illustration or plan of presentation; and (e) certainly there was no reduction in the demand for the original. Following this line of reasoning, there could have been no substantial taking and no unfair use.

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[79] 177 Fed. 286 (C.C.S.D.N.Y. 1909).

[80] 177 Fed. 287 (C.C.S.D.N.Y. 1909).

[81] Ball, Law of Copyright and Literary Property § 140 (1944).

[82] Hill v. Whalen & Martell, supra note 74 "A copyrighted work is subject to fair criticism, serious or humorous, so far as is necessary to that end quotations may be made from it. . . ."

What has been written in the many court decisions, textbooks and comments is only further evidence of the confusion, inconsistencies and lack of agreement as to where the permitted use ends and the forbidden use begins. The right of the author, publisher, producer, or what have you, to use quotations or excerpts from the copyrighted work without permission of the copyright owner remains dependent upon the facts and circumstances of the particular case. Perhaps this is why the courts have avoided any attempts at laying a concrete line of demarcation between the fair and the unfair use of copyrighted works.

Suffice it to say, the would-be borrower is yet without a rule to follow; he must yet rely upon his own best judgment in such matters or, perhaps better said, the judgment or advice of legal counsel. Whatever the course taken, it is submitted that the best course, by way of safety first, is to secure beforehand the permission of the copyright owner to the use of his property.

Gerald Alexander Gafford

PARTIAL ACCEPTANCE UNDER SALES CONTRACTS IN MISSISSIPPI

I. GENERALLY

In Mississippi the buyer of goods may not accept part of a shipment of goods under a contract to sell or a sale unless the contract is regarded as "divisible."[1] Similarly, where a contract to sell or a sale is regarded as "entire," the buyer must accept or reject all of the goods shipped to him under the terms of the contract.[2] These principles are applicable as stated where the defect complained of is one of quality, otherwise, the principles are subject to limitation. In the case where there is too large a quantity, in other words goods not ordered, the buyer is allowed to reject the goods which are clearly not a part of the contract.[3] In order for this to be accomplished, the goods must be clearly distinguishable from the goods which are a part of the contract, i.e. they must be "severable" or "divisible."[4] A second limitation is in the case of installment contracts where the buyer may accept installments of a defective quality without obligating himself to accept future installments of like defect.[5]

The importance of this facet of the law of sales is in the determination of the rights of the parties with reference to the contract. Further, the common law, as it prevails in Mississippi, is not the rule under the Uniform Sales Act, nor is it in accord with modern business practice. Sellers generally expect to have defective goods returned to them even though the goods are a part of the contract to sell. It is certainly more expedient to have these adjustments made in the preliminary dealings between the parties rather than to have the buyer accept goods which are manifestly undesirable. The statement is made, in one of the cases dealing with defects in quantity, that the seller may not bind the buyer to buy something that he did not contract to purchase by sending him an excess of goods.[6] Why is this not true in the case of goods defective in quality?

It will be noted that whether the buyer is allowed to accept or reject part of a shipment in Mississippi is directly dependent on the nature of the contract. The buyer will be so allowed where the contract is "divisible" but will be required to accept or reject *in toto* where the contract is an "entirety." This requirement will be examined in subsequent sections of this discussion. For purposes of administration of the Uniform Sales Act, the term "divisible" is defined therein.[7]

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[1] J. W. Carter Co., Inc. v. Farley Clothing Co., 216 Miss. 238, 62 So.2d 305 (1953); Chatham v. All American Sales Inc., 213 Miss. 88, 56 So.2d 42 (1952); Colossus Co. v. D. L. Fair Lumber Co., 161 Miss. 267, 136 So. 919 (1931); Colossus Co. v. D. L. Fair Lumber Co., 156 Miss. 878, 127 So. 300 (1930); Hytken Brothers v. Hanover Childrens Wear Co., Inc., 155 Miss. 478, 124 So. 654 (1929); Hytken Brothers v. International Dress Co., 155 Miss. 469, 124 So. 653 (1929); S. P. Nelson & Sons v. Wilkins & Parks, 151 Miss. 492, 118 So. 436 (1928); Rubenstein v. Grossman-Winfield Millinery Co., 109 Miss. 819, 69 So. 688, (1915); *suggestion of error overruled,* 110 Miss. 213, 70 So. 210 (1915); Hutchins v. Smith Harrison & Co., 106 Miss. 852, 64 So. 789 (1914); Ormond v. Henderson, 77 Miss. 34, 24 So. 170 (1898). See also 77 C.J.S., Sales, § 101.

[2] See note 1, supra.

[3] Hutchins v. Smith Harrison & Co., 106 Miss. 852, 64 So. 789 (1914).

[4] Ibid.

[5] Red Star Milling Co. v. Moses, 176 Miss. 634, 169 So. 785 (1936); Chatham v. All American Sales Inc., 213 Miss. 88, 56 So.2d 42 (1952).

[6] See note 3, supra.

In the Uniform Sales Act, there is no provision which states that a buyer may reject a portion of the goods tendered under a contract to sell on the grounds that the goods are defective in quality except in the case where the goods have perished.[8] Under that statute, a buyer may reject parts of shipments not correct in quantity or where there are goods of a different description mixed with goods that the buyer ordered. The one limitation to these principles expressed in the Sales Act is that the price of the goods rejected must be ascertainable by computation.[9] This requirement is the essence of the statutory definition of "divisible contracts."[10] Therefore, it is to be assumed, at least as far as the Sales Act is concerned, that there may be no partial rejection at all unless the contract meets the statutory requirement of "divisibility."

A preliminary conclusion forces one to believe that the law under the Sales Act is not much different from that in Mississippi since, as a condition precedent to partial acceptance, there must be a finding of "divisibility." As a generality, perhaps this has some merit, but as one goes behind the meaning of the term "divisible" as employed in Mississippi and in those jurisdictions having the Uniform Sales Act, it becomes immediately apparent that the common law concept involves the consideration of a great many more factors than does the Sales Act which is concerned with the matter of price only.[11] Thus, an examination of the terms "entire" and "divisible," as employed in the two types of jurisdictions, will demonstrate the cleavage that exists between them.

II. MEANING OF TERMS

A. *Entire*

In the common law jurisdictions, the term "entire" has been frequently discussed and the rationale of the decisions seems to be that, under an "entire" contract to sell or a sale, the buyer is not bound to receive goods in installments, the seller may not deliver goods in installments, the buyer may not pay for goods in installments, and the seller is not under any duty to accept payment in installments.[12] It appears that an "entire" contract is a bargain for a single performance in exchange for another single performance.[13] Anything less than this, either in contemplation or action by one of the parties, and acquiesced in by the other, is generally regarded as tending toward a "divisible" contract. The key to the determination of the status of the contract is the intention of the parties to the contract.[14]

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[7] 1A U.L.A. § 76.
[8] 1 U.L.A. §§ 7,8.
[9] Ibid.
[10] 1A U.L.A. § 76.
[11] Ibid.
[12] 2 Williston, Sales § 466 (Rev. Ed., 1948).
[13] Cf. 2 Williston, Sales § 467 (Rev. Ed., 1948).
[14] Accord: 2 Williston, Sales, p. 760, n. 20 (Rev. Ed .1948).

The traditional factors that go to make up the intention of parties to a contract are considered in this determination. The rationale of an "entire" contract discussion takes into consideration the nature of the subject matter sold,[15] the provisions of the contract for payment,[16] delivery,[17] number of orders placed,[18] and actions of the parties both prior and subsequent to the making of the contract.[19] Each of these factors is but a litmus for the question of intention of the parties.

All of the above factors are given consideration in the common law states like Mississippi. In states where the Uniform Sales Act is in force, the only test of "divisibility" or "entirety" is whether the price of the goods accepted may be ascertained by computation.

B. *"Divisible"*

Where it is necessary to a decision of a case that the "divisibility" of the sales contract be adjudicated, the same factors which are considered in the meaning of "entire" must also be a part of the discussion —the terms being at war with each other. The general thesis of a "divisible" contract to sell is that out of the agreement between the parties, there may be discerned some tacit subordinate agreements which are not necessarily dependent upon other agreements for their efficacy. Generally, "divisible" sales contracts fall into three categories: (1) contracts for installment delivery and payment; (2) contracts where there is one order, one delivery, and one payment, but, during the bargaining process leading up to the contract, there were several distinct bargains made for the sale of individual goods, or distinct groups of goods. The mere existence of identifiable units of goods with an ascertainable price, standing alone, is not sufficient to constitute a contract which is deemed "divisible" in most common law states;[20] (3) contracts that include what would normally be classed as an "entire" sales contract but which, by subsequent action of the parties with reference to the contract, has become "divisible." The question of "divisibility," like that of "entirety," rests ultimately upon a factual determination of the intention of the parties. An additional consideration in the determination of the nature of a sales contract is the matter of whether, upon delivery of part or acceptance of part, a debt is created at that time and how much of a debt.[21] If the debt that arises is only for that part delivered or accepted, the contract is regarded as "divisible."

III. MISSISSIPPI CASES

A. *Generally*

For purposes of discussion of the matter of partial acceptance, the cases have been classified in accordance with the complaint of the buyer in his attempt to effect a partial abrogation of the contract of sale. These classifications are: (1) defects in quantity; (2) defects in quality; and (3) goods of a different description mixed with goods ordered.

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[15] Central Georgia Brick Co. v. Carolina Portland Cement Co., 136 Ga. 693, 71 S.E. 1048 (1911); Hart-Pharr Co. v. Duncan, 75 Okla. 59, 181 Pac. 288, 4 A.L.R. 1434 (1919).

[16] National Wholesale Grocery Co. v. Mann, 251 Mass. 238, 146 N.E. 791 (1925).

[17] Chatham v. All American Sales Inc., 213 Miss. 88, 56 So. 2d 42 (1952).

[18] Fleischer Knitting Mills v. Greenberg, 54 Ga. App. 552, 188 S.E. 458 (1936); Austin v. Brown Brothers, 30 Idaho 167, 164 Pac. 95 (1917).

[19] Chatham v. All American Sales Inc., 213 Miss. 88, 56 So.2d 42 (1952). See also 2 Mechem, Sales, p. 1215.

[20] 2 Williston, Sales, p. 760, n. 1 (Rev. Ed. 1948).

[21] But cf. 2 Williston, Sales, p. 761, n. 2 (Rev. Ed. 1948).

(1) *Defects in Quantity*

The leading case on this phase of the discussion is *Ormond v. Henderson.*[22] Henderson, the seller, sued Ormond for the purchase price of twenty-five barrels of sugar. Ormond had contacted Hester, a broker and agreed to buy ten barrels of sugar thinking that Hester had the sugar on hand. Hester ordered, from Henderson, twenty-five barrels of sugar. Henderson shipped the sugar to Ormond who accepted only ten barrels and turned the bill of lading over to Hester. Ormond only paid for the ten barrels that he accepted. The court held that when the buyer learned of the mistake, it was competent for him to refuse to accept the sugar, but that the buyer cannot accept a part without the seller's consent. The rule of the case seems to be that where a mistake is made with reference to the quantity of goods, the buyer must accept all or refuse to accept any; and give the seller notice of the mistake, and inform him that the goods are subject to his order.

It will be noted that the buyer (Ormond) dealt with the goods by transferring the excess goods to Hester. It is a principle of sales law that one may not deal with goods as his own without rendering himself liable for the purchase price thereof. It is possible that the court gave great weight to this fact and one may only guess what the result would have been had the excess goods been returned to the seller. There was no discussion of the nature of the contract to sell, nor was any of the decision devoted specifically to declaring the contract an entirety.

In the case of *Hutchins v. Smith Harrison & Co.,* [23] Hutchins ordered merchandise from the seller, but when the shipment arrived, Hutchins discovered that the seller had not only shipped the goods ordered but had shipped other goods also. There is no description of the goods in the decision. Hutchins, after discovery of the mistake, returned the goods not ordered to the seller and retained the goods ordered. The buyer offered to pay for the goods retained. The seller refused to accept the returned goods and brought action to recover the value of the entire shipment. The court held that where the seller delivers to the buyer the goods he has contracted to sell, mixed with goods of a different description, the buyer may accept the goods which are in accordance with the contract and reject the rest. The court also said that the contract actually made is binding on both parties and the seller cannot defeat the buyer's rights to the goods bought by him by mingling with them other goods of a different description.

The *Hutchins*[24] case is included in this category dealing with quantity for the reason that the goods, which are unknown, could have been an excess of goods of the same nature as those retained. The decision does not make this, or the converse, plain. However, the *Ormond*[25] case was cited by the plaintiff-seller to support his contention that the buyer was liable for the entire shipment. The court stated that the *Hutchins*[26] case was not in conflict with the *Ormond*[27] decision because the facts of the two cases were different. The cleavage in the facts of the two cases seems to be the exercise of control over the goods by the purchaser in the *Ormond*[28] case; the fact that the goods in the *Hutchins*[29] case were *not ordered* by the purchaser; and, impliedly at least, that the goods in the *Hutchins*[30] case were goods of a different description while in the *Ormond*[31] decision there was an excess quantity.

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[22] 77 Miss. 34, 24 So. 170 (1898).

[23] 106 Miss. 852, 64 So. 789 (1914).

[24] Ibid.

The rule of the two cases, taken together, appears to be that the buyer may partially accept goods of a different description not included in the contract but may not partially accept goods of a like description in an excess quantity. Assuming for the moment that the goods in the *Hutchins*[32] case were of a like description, but not ordered by the buyer, would the rule in the *Hutchins*[33] case apply? Under the present state of Mississippi law, it seems likely that it would not. However, if the goods are separable and it is manifestly plain that the goods were not ordered, though of a like description, would the rule of the *Ormond*[34] case apply? In the facts of the *Ormond*[35] case it is seen that the goods were ordered but not by the buyer. This fact may have been cured in favor of the plaintiff by the buyer's acts in assuming control over the merchandise. The ultimate inquiry in considering these cases is, why is not the rule applicable to mixed "severable" goods also applicable to excess goods which are similarly indentifiable, severable, and not contracted for?

The case of *Rubenstein v. Grossman-Winfield Millinery Co.*, 109 Miss. 819, 69 So. 688 (1915), *suggestion of error overruled,* 110 Miss. 213, 70 So. 210 (1915), deals with the purchase of a "job lot" of hats. The buyer contended that he had purchased the hats individually, and, as a consequence, could reject an excess in quantity. The purchaser stated that he had viewed a "job lot" of hats which was represented to him to contain three or four dozen hats and that he had agreed to take the "job lot" provided there were only three or four dozen hats contained therein. The seller testified that the buyer had bargained for the entire "job lot" and contended that he was liable for the entire purchase price. The "job lot," when it arrived, consisted of 27 1/3 dozen hats. The buyer selected some of the hats from the shipment and returned the remainder to the seller. The seller then brought this action against the buyer for the entire purchase price of the shipment. The court, considering the formulation of the contract in an effort to determine the intention of the parties with reference to th "divisibility" of the contract, found that the seller's offer was to sell th buyer the entire "job lot" and that the seller had agreed to accep the entire lot provided it did not contain more than three or fou dozen. The court held that, this being true, when the buyer di covered the excess in quantity, the duty devolved upon him of accep ing or rejecting the lot as a whole. He could not, without the seller consent, accept a part and reject a part.[36]

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[25] Ormond v. Henderson, 77 Miss. 34, 24 So. 170 (1898).
[26] Hutchins v. Smith Harrison Co., 106 Miss. 852, 64 So. 789 (1914).
[27] See note 25, supra.
[28] Ibid.
[29] See note 26, supra.
[30] Ibid.
[31] See note 25, supra.
[32] See note 26, supra.
[33] Ibid.
[34] See note 25, supra.
[35] Ibid.

In its opinion, the court said that if the buyer's version of th dealing had been true (that he had purchased the hats individually the case would have fallen under the *Hutchins*[37] rule as goods no ordered. In this dictum, is not the court endorsing the position tha the rule in the *Hutchins*[38] case should be applicable to defects i quantity (excesses) even though goods of a like description? These sub sequent cases seem to confirm the position that had the buyer in th *Ormond*[39] case returned the goods to the seller, the result would hav been different.

There was a suggestion of error based on the grounds that th holding in the *Rubenstein*[40] case was in conflict with the *Hutchins*[4 rule. The court overruled this suggestion by stating that the goods i the *Hutchins*[42] case were not bought by the buyer while in the presen case the buyer actually bought the entire "job lot." The court, in th decision, went on to say that there was no way to identify the good bought from the goods not bought, and when the purchaser discovere this fact, it was incumbent upon him either to accept or reject the en tire shipment. It is difficult to explain why the court talks of separ ability of goods not bought when it has adjudged that the buye bought the entire "job lot."[43]

(2) *Defects in Quality*

The leading case in this section is the case of *Kanson Hat & Ca Mfg. Co. v. J. D. Blakeney & Son*.[44] The suit was on an open account fo hats delivered to the buyer. Evidently, the buyer selected four hats from the shipment and returned the rest on the ground that there were more than he ordered and were not of the grade and quality that he had ordered. The buyer claimed that this entitled him to a recission of the contract. The court held that the offer to return a part of a shipment of goods is not sufficient to effect a recission of the contract. It was stated that the contract could have been rescinded by returning, or offering to return the goods to the seller.

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[36] Rubenstein v. Grossman-Winfield Millinery Co., 109 Miss. 819. 69 So. 688 (1915), *suggestion of error overruled,* 110 Miss. 213 ,70 So. 210 (1915).

[37] See note 26, supra.

[38] Ibid.

[39] See note 25, supra.

[40] Rubenstein v. Grossman-Winfield Millinery Co., 109 Miss. 819, 69 So. 699 (1915).

[41] See note 26, supra.

[42] Ibid.

[43] Rubenstein v. Grossman-Winfield Millinery Co., 110 Miss. 213, 70 So. 210 (1915) *overruling a suggestion of error* in 109 Miss. 819. 69 So. 688 (1915).

[44] 142 Miss. 851, 108 So. 139 (1926).

The case of *S. P. Nelson & Sons v. Wilkins & Parks,*[45] was an action for the price of an order of hats. Upon arrival of the hats, the buyer removed one dozen of one variety and 1/6 of one dozen of another and shipped the remainder to the seller, offering to pay for the hats retained, and declining to accept the hats returned. The seller declined to accept the hats returned. The court held that the buyer could not accept a part and reject a part of the goods shipped, and yet effect a recission of the contract notwithstanding the defense of the buyer that the goods were not of the quality ordered. In these cases, it appears that the court regards these items, though defective in qauitly, as having been ordered. This is regarded as a fiction. The necessity for its use, however, is found in the remedy. The alternative to such a holding is an endorsement of the theory of partial acceptance. Orderly contractual relations seem to be the order of the day in Mississippi.

The case of *Chatham v. All American Sales Inc.,*[46] involves an installment contract where there was a partial acceptance of goods, the rejection being on the basis of quality. This was a suit by the seller for damages by reason of the buyer's refusal to accept 18 automatic washing machines as a part of a 40-machine order. There was but one order; however, the seller delivered the machines in three installments. The buyer acquiesced in this action by accepting the first two installments of the machines. The buyer refused to accept the third installment because the factory serial numbers and manuafcturer's guarantee bond had been removed prior to shipment. The prices on the individual washers were $158 per unit. There was a verdict in the lower court for the sellers. The Supreme Court reversed this holding by stating that the trial judge's opinion that the contract was "entire" was erroneous. The court was of the opinion that if all the washers had been shipped at one time and under one bill of lading, the case would have fallen under the *Kanson Hat & Cap Mfg. v. J. D. Blackney & Son*[47] and *S. P. Nelson & Sons v .Wilkins & Parks*[48] rules, which would have made the buyer liable for the price of the entire order. The contract, as conceived by the parties, seems to have been an "entirety." However, the subsequent action of the parties, after the order had been given and accepted, indicated that the contract was regarded as "divisible." This position is generally accepted by authorities who adhere to the theory that even if the contract would not ordinarily be deemed severable, the parties may, by their subsequent conduct, so treat it as to show that they regarded it as severable in fact.[49] Where the delivery is to be in installments, the fact that the buyer has accepted one installment will not preclude him from refusing to accept a second installment which, in fact, does not conform to the contract. This is the law in Mississippi on partial acceptances under installment contracts.[50] The case does not tell us how far this concept of "divisibility" goes with respect to partial acceptances other than to "an installment." May part of an installment be accepted where the goods are separable? There is no decision on this point in Mississippi. In the case where there is a shipment of a single installment accompanied by multiple drafts, is the installment "divisible?"

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[45] 151 Miss. 492, 118 So. 436 (1928).

[46] 213 Miss. 88, 56 So.2d 42 (1952).

[47] See note 44, supra.

[48] See note 45, supra.

[49] Brown Bag Filling Mach. Co. v. United Smelting & Aluminum Co., 93 Conn. 670, 107 Atl. 619 (1919), 2 Mechem, Sales, p. 1215.

[50] Red Star Milling Co. v. Moses, 176 Miss. 634, 169 So. 785 (1936).

J. W. Carter Co. Inc. v. Farley Clothing Co.,[51] raises another interesting point in connection with partial acceptances. The case involved a suit by a shoe manufacturer against a buyer. The order for the shoes was taken by a salesman of the plaintiff from a branch manager of one of the defendant's stores. This order was taken by the salesman with the understanding that the branch manager was not authorized to bind the defendant on an order. The order was never signed by the buyer-defendant and hence did not constitute a valid offer. The seller shipped 35 pair of shoes to the buyer. When the shoes arrived, one box was damaged. The buyer returned 31 pairs of the shoes and retained 4 pairs. The court dealt with the case by holding that the buyer must accept or reject the shipment *in toto,* and an acceptance of part will constitute an acceptance of the whole where the shipment or order is regarded as an entirety. In this situation the court held that there had been *no* contract and that the shipment of the shoes constituted an offer to sell. The authorities are in agreement that a conditional order may become an effective contract of sale by acts of acceptance and confirmation by the parties, and an acceptance of the goods, or any part thereof, constitutes confirmation by the buyer.[52] The Mississippi court held to the position that the acceptance of four pairs of the shoes constituted an acceptance of the entire shipment of 35 pairs. For this to be a contract, there is required some degree of mutuality in order to be binding on the parties, but there is a considerable lack of it in this factual situation. It is stretching the imputation of intention a bit far to attribute a willingness on the part of the buyer to accept 35 pairs of shoes *in the absence of a contract* valid as between the parties.

(3) *Goods of a Different Description Mixed With Goods Ordered*

This grouping of the cases begins with the case of *Hutchins v. Smith Harrison & Co.*,[53] which holds that mixed goods, not included in the contract, may be returned by the buyer without rendering himself liable for the whole amount of the shipment. The buyer under the *Hutchins*[54] rule may thus accept those goods which are in accordance with the contract and pay for them at the contract rate. As was mentioned previously, no discussion was devoted in the case to the nature of the goods in the *Hutchins*[55] case, therefore, from that case alone it is difficult to establish a rule with any rigidity except by implication. By this process, it is logical to conclude that the goods must be of a severable nature; that their price or prices must be ascertainable by computation; they must be readily identifiable and distinguishable from the goods bought; and they must be without the terms of the contract of sale. Subsequent cases seem to confirm the guide lines implied in the *Hutchins*[56] case.

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[51] 216 Miss. 238, 62 So.2d 305 (1953).

[52] 77 C.J.S., Sales, § 25, p. 633.

[53] See note 26, supra.

[54] Ibid.

[55] Ibid.

The case of *Hytken Bros. v. International Dress Co.,* is a case of mixed goods but the buyer was unable to establish his acts in rejecting goods sent to him under the *Hutchins*[58] rule. The buyer had ordered some dresses from the seller. They were all selected during the same transaction, a single bill being made out for the sale. The goods were shipped together. Upon their arrival, the buyer selected two of the dresses and returned 18 claiming that they were not the pattern selected by the buyer. The seller declined to receive the shipment and brought suit against the buyer for the total amount of the order. Hytken contended that the sale of each dress was a separate transaction at a special price. All of the dresses sold for $16.50. The buyer here seems to have chosen not to bring these dresses under the theory of mixed goods, rather, he tried to make of the dealings between himself and the seller several individual transactions. The proof of this fact would have allowed him to reject individual pieces without making himself liable for the entire amount of the shipment. The court held against the buyer on the question of several transactions by saying that the ordinary rule is that the purchase of a bill of goods at one time and in one transaction, although different articles are priced at different prices, or at the same price, is one transaction.

The case seems to have been decided on the basis of some oral statements made by the buyer to the seller which the court interpreted as being an agreement between the parties that if the dresses were not of the pattern selected by the buyer upon their arrival, the buyer would return all of them. Were it not for subsequent cases, one might draw a conclusion that in the absence of the oral statements, the case would fall under the *Hutchins*[59] rule as goods not ordered; however, the later cases negative such an assumption.

Another case involving Hytken was decided on the same day as the previous case. The case of *Hytken Brothers v. Hanover Children's Wear Co., Inc.*[60] is very similar to the previous case and holds that where colors of dress goods are duplicated in a shipment of an order, and where there was an understanding that if the colors were duplicated the entire shipment would be returned, the buyer may not accept part and reject part. Again the buyer relied upon the proposition that individual bargains were made for the individual dresses. The court held against this proposition for the same reasons as expressed in the previous case. Although the syllabus (by the court) mentions some agreement between the parties concerning return of the entire shipment, such agreement is not reflected in the report of the case. It seems important to the case that this agreement should have been included. It seems important to the case that this agreement should have

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[56] Ibid.

[57] 155 Miss. 469, 124 So. 653 (1929).

[58] See note 26, supra.

[59] Ibid.

[60] 155 Miss. 478, 124 So. 654 (1929).

been included. If there was an agreement on the question of the return of the entire shipment, the buyer is inextricably bound to comply, but, in the absence of such an agreement, perhaps the pleading of the mixed goods doctrine of the *Hutchins*[61] case would make some difference.

This matter of an express agreement for the return of goods being crucial to the decision where there is an objection by the buyer on account of mixed goods is cleared up by the case of *Colossus Co. v. D. L. Fair Lumber Co.*[62] In that case there seems to be no question but that an express agreement for the return of an entire shipment is only incidental to the law where the objection of the buyer is based on goods not of the nature which he ordered. The buyer there ordered some sawmill supplies and a shotgun. When the good arrived, the shotgun was retained by the buyer and the sawmill supplies were returned; the buyer claimed that the goods returned were not the kind, character, and grade of goods that he ordered. The order, as placed by the buyer, was not subject to countermand. When the goods were returned to the seller, the seller retained them subject to the order of the buyer. The court held that the buyer was liable for the price of the entire order because his acceptance of part of the order is an acceptance of the whole. This holding was subject to a finding that the seller had not received the returned goods in payment upon the original order. In the subsequent case of *Colossus Co. v. D. L. Fair Lumber Co.,* 161 Miss. 267, 136 So. 919 (1931), proof was put on by the plaintiff-seller to the effect that the seller had not accepted the returned goods as payment, instead, they were holding the goods subject to the order of the defendant-buyer.

The rule of these cases, notwithstanding the heavy weight of the *Hutchins*[63] case, seems to be that if there is a mistake in the shipment of goods ordered, and the shipment includes goods similar to those ordered, and in the same amount, regardless of the fact that they do not conform to the contract, and, in a sense are goods of a different description, the buyer is under a duty to accept or reject the shipment *in toto.*

IV. RULES UNDER THE UNIFORM SALES ACT

Sales Acts, sometimes modifications and variations of the Uniform Sales Act, are in force in 34 states, Hawaii, the Canal Zone, and the District of Columbia. Section 44 of the Uniform Sales Act provides for a course of action where the seller delivers the wrong quantity of goods.[64] Where the seller delivers less than the correct amount of goods, the buyer may reject them. But, if the buyer knows that the seller is not going to fully perform the contract when he accepts or retains less than the contract quantity, the buyer must pay for the goods at the contract rate. Where there is an acceptance of less goods and the buyer does not know that the seller does not intend to fully perform the contract, the buyer is bound to pay for the goods so accepted, but the price is only the fair value to the buyer of the goods received.

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[61] See note 26, supra.

[62] 156 Miss. 878, 127 So. 300 (1930).

[63] See note 26, supra.

[64] 1A U.L.A. § 44 (1).

Section 44 (2)[65] provides that where the delivery of goods is larger than is called for by the contract, the buyer may accept goods included in the contract and reject the rest, or he may reject the whole.

Section 44 (3) provides that where the seller delivers goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.[66]

There is no express provision of the Uniform Sales Act having to do with the problem of partial acceptance of goods which have defects in quality. Taking the state of New York as an example on this question, formerly, the lower courts of that state held that the Sales Act made no change in the common law on this matter. An acceptance of part by the buyer made him liable for the whole. However, with the advent of the case of *Portfolio v. Rubin,*[67] it was held that objections to the defective quality of goods will allow the buyer to accept a part and reject a part without rendering himself liable for the entire order. In that case the seller sold the buyer four pieces of cloth which were to be used for the manufacture of cloaks and suits. The buyer accepted two pieces and rejected the other two on the grounds that they were unfit for manufacture. The Court of Appeals held that the buyer could do this under the New York counterpart[68] of Section 44 (3) of the Uniform Sales Act because the goods complained of were of a different description from those purchased by the buyer.

Sections 7 and 8 of the Uniform Sales Act provide for the acceptance of goods sold and those contracted to be sold which have perished or have been destroyed. In the former case where the goods have wholly perished without the knowledge of the seller at the time the agreement is made, the agreement is void, but, where the goods perish in part, without the knowledge of the seller, the buyer has his option of avoiding the agreement or he may hold the seller to the agreement for so much of the goods as have not perished.[69] In the latter case, if the contract is indivisible, the buyer must pay for the full shipment or order. If the contract is divisible within the meaning of Section 76,[70] the buyer is liable for the agreed price of the goods that the buyer receives.

Section 8[71] provides that where there is a contract to sell, and where the goods are the property of the seller, and the goods wholly perish, the contract is avoided. In the case where the goods partially perish or are changed substantially in character, the buyer has the same options as he has under Section 7.

The Uniform Sales Act defines a "divisible contract to sell or sale" as a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.[72] The question of "divisibility" is important in Sales Act states just as it is in common law states. "Divisibility" under the Sales Act determines what the buyer shall pay the seller after the buyer has exercised his options of acceptance or rejection granted him under the Sales Act. In common law jurisdictions like Mississippi, the question of "divisibility" is determinative of the option pertaining to acceptance. Also, "divisibility" in common law states covers a vastly broader field of considerations than does the Sales Act concept which is confined to the matter of price and its capability of ascertainment by computation—a single consideration.

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[65] 1A U.L.A. § 44(2).

[66] 1A U.L.A. § 44 (3).

[67] 233 N.Y. 439, 135 N.E. 843 (1922). Note, 38 Harv L. Rev. 988; Note 35 Colum L. Rev. 726.

[68] New York, Personal Property Laws, c. 44, § 125 (3).

[69] 1 U.L.A. § 7.

[70] 1A U.L.A. § 76.

[71] 1 U.L.A. § 8.

V. CONCLUSION

From the cases and authorities reviewed, it is apparent that the question of partial acceptance of goods under a sales contract is largely dependent upon a determination of whether the contract is "divisible." Under the Sales Acts, there are provisions of the Act and interpretations which allow buyers to accept parts of orders and shipments. These provisions do depend to some degree upon a statutory definition of "divisibility," but this is a specialized definition relating to price alone. The test of "divisibility" under the Sales Acts is strictly a matter of price while the common law definition involves a determination of the intention of the parties in order to arrive at what amounts to an intention to bargain separately for each of the units of the subject matter. On the one hand we have partial acceptance authorized by statute or interpretation with the matter of "divisibility" entering the consideration subsequent to the partial acceptance. Under the common law, the matter of "divisibility" must be a precedent consideration. Rights of the parties in varying jurisdictions may be quite different. The majority of states have the Uniform Sales Act, or some modification thereof.

Whatever the conclusion might be to a technician, the businessman, more especially the buyer, is quick to grasp the dogmatically fundamental attitude of our law. Generally, in business practice, sellers expect and buyers are usually quick to return goods not in accordance with the contract. Adjustments are much more easily made by the parties than they could be where the remedies of each results in court action. From this view at least, the Sales Act rules are preferred, but one must learn to cope with the rules of the common law for the sake of orderly contractual relations. Orderly contractual relations are also important.

M. Curtiss McKee

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[72] See note 70, supra.

RECENT DECISIONS

HIGHWAYS—ABUTTING PROPERTY OWNERS RIGHT TO COMPENSATION FOR LOSS OF DIRECT ACCESS TO LIMITED ACCESS HIGHWAY

An abutting property owner to a newly constructed highway received permission from the State Highway Commission to construct temporary direct means of access to a newly constructed limited access highway, while it was under construction. The property owner brought an action for damages for anticipated closure of his means of access. The state had plans to provide a frontage road for access to the highway. The lower court held the owner was not entitled to any damages for the anticipated closure. **HELD**: Affirmed. A valid exercise of the police power of the state in protecting the interests of human life and in regulating public traffic, is substituting, in lieu of such means of direct access, a frontage road so as to afford the abutting property owner reasonably safe and convenient access from all of their abutting property. *Harreld v. Mississippi State Highway Commission,* 103 So. 2d 852 (Miss. 1958).

The origin of the right of access is somewhat obscure,[1] but it may be said to have arisen by virtue of court decisions which recognized the existence of the right.[2] Originally roads were constructed to enable abutting landowners to have access to the outside world and this fact probably motivated the court in reaching these decisions.[3] The right of direct access to an established, "and service road,"[4] is considered a property right once it has come into being, and a complete taking of it is compensable.[5] In at least two jurisdictions compensation has been allowed for circuity of travel,[6] however, the trend seems to be to disallow compensation where the indirect access provided is reasonable.[7] Generally, compensation is not allowed for lossif indirect access,[8] as where a road formerly fronted the property and ran into the highway. Where the abutting landowner's property did not abut the highway prior to construction or reconstruction of a limited access highway, no right of access is lost because none existed[9] and to allow compensation for loss of a nonexistent right would be to make a gift to the landowner.[10] However, lack of access may be considered in assessing severance damages when the abutting landowner's property is split by the highway.[11]

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[1] Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).

[2] Bacich v. Board of Control, supra note 1; Muhlker v. New York and Harlem Railroad Co., 197 U.S. 544, 571 (1904) (dissenting opinion).

[3] Cunningham, The Limited Access Highway from a Lawyer's Viewpoint, 13 Mo. L. Rev. 19 (1948). "Back in the horse and cart days of early English or colonial history, neighboring landowners cleared or opened passage-ways through their woods and fields so they could haul their produce to the nearest village, or perhaps ride, instead of walk, to the village church or inn. I can remember the early years of this century in the ozark hills of Missouri when a farmer located, constructed and maintained a country road as if it were his private road or property, to which, however the public was always welcome—just as a stranger was always welcome to drop in for a free meal or night's lodging. Under such conditions it is naturally taken for granted that the landowner who had contributed all construction and maintenance labor, as well as right-of-way, should have the right of access to 'his' road at any place he pleased. Common understanding and common custom eventually become common law."

[4] This term has been used to describe the normal, ordinary road or highway, which is regarded as being intended primarily to enable abutting landowners to have access to the outside world, as distinguished from the limited-access road which is a "traffic-service road" designed primarily to move through traffic. 43 A.L.R. 2d 1074, note 7.

[5] Boxberger v. State Highway Commission, 126 Colo. 526, 251 P.2d 920 (1952); People v. Thomas, 108 Cal. App. 2d 832, 239 P.2d 914 (1952); State Highway Commission v. Burk, 200 Ore. 211, 265 P.2d 783 (1954); State v. Dunlick Inc., 77 Idaho 45, 286 P.2d 1112 (1955); Peck v. State 5 Misc. 2d 796, 161 N.Y.S. 2d 657 (1957); Creasy v. Stevens, 160 F.Supp. 404 (W.D. Pa. 1958).

[6] People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); Oklahoma Turnpike Authority v. Chandler, 316 P.2d 828 (Okla. 1957).

In recent times when more and more automobiles are traveling our highways, there is a definite need for a system of limited access highways, which will allow this traffic to move rapidly and safely. There will continue to be a need for land service roads and the abutting property owner's right of access to such roads should be protected. However, considering the purpose for which limited access highways are constructed,[12] it is submitted that the Court, in the present case, has reached the best result by attempting to balance public safety and convenience against private rights, producing a fair over-all result without causing undue hardship on either the public or the individual.

James E. Wilkerson, Jr.

Titles—Implied Resolutions—Reciprocal Negative Easements—Equitable Easements

This was an action to determine whether deeds, conveying portions of a tract of land[1] and subjecting the conveyed portions to certain restrictions on the use thereof[2] for the benefit of the unconveyed portion,[3] created implied restrictions or so-called "reciprocal negative easements" against the portion retained by the grantor.[4] The lower court held that since the law favors the unrestricted use of property, a strict construction would apply and in the absence of a general plan for the development of the entire tract of land, the existing restrictions would not be extended by implication. HELD: Affirmed. *Mission Covenant Church v. John W. Nelson,* 91 N.W.2d 440, (Minn. 1958).

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[7] Carazella v. State, 269 Wis. 608, 71 N.W.2d 276 (1955); Iowa State Highway Commission v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957).

[8] Smick v. Commonwealth, 268 S.W.2d 424 (Ky. 1954); but see, Schnider v. State, 38 Cal. 2d 652, 241 P.2d 1 (1952), the court did not actually give damages as such, but stated that damages had already been received for loss of indirect means of access which formerly fronted his property and ran into the highway.

[9] State v. Fonburg, 328 P.2d 60 (Idaho 1958); Schnider v. State, supra note 8.

[10] Schnider v. State, 38 Cal. 2d 652, 241 P.2d 1 (1952); State Highway Commission v. Burk, 200 Ore. 211, 265 P.2d 783 (1954).

[11] State v. Ward, 41 Wash. 2d 794, 252 P.2d 279 (1952).

[12] See note 4 supra.

[1] Prior to November 7, 1952, the plaintiff-appellee, the Mission Covenant Church, was the owner of contiguous subdivisions A, B, and C. On that date plaintiff conveyed to J. W. Nelson, subdivision A of the Tract ABC. On December 6, 1953, plaintiff conveyed to Nelson, subdivision C. Nelson subsequently conveyed portions of subdivision A to Goldt and Cook.

[2] The deeds contained restrictions forbidding the use of subdivisions A and C for the making and selling of intoxicating beverages, or for a public nuisance, or for construction of buildings to be used for offensive purposes, or for other conditions particularized. The deeds also provided that any remote grantee of the conveyed premises would be entitled to bring injunction proceedings if the enumerated restrictions were violated.

[3] The deed also contained the following:

> These restrictions shall be for the benefit of the grantor and its successors and assigns and for the benefit of any person or persons hereafter purchasing . . . (the land described in subdivision B).

Although it has long been settled that the law favors the unrestricted use of property with all doubts being resolved in favor of the free use of property against restrictions,[5] the validity of a restrictive covenant is sustainable so long as the beneficial enjoyment of the estate is not materially impaired and the public good and interests are not violated.[6] Yet, in spite of the disfavor aroused by restricted uses, there can be an implied reciprocity of restriction.[7] But the weight of authority is that in the absence of an express covenant by the grantor restricting the land retained by him or in the absence of an evinced plan of general improvement of all the land bearing the relation originally held by the grantor, the grantee of a restricted conveyance can not assert reciprocal restrictions against the land retained by the grantor.[8] The court correctly differentiated *Sanborn v. McLean,*[9] the case heavily relied upon by the defendants, for in the *Sanborn* case the court recognized th existence of a general and permanent building scheme,[10] while in th case at bar, the appellees,[11] the plaintiffs in the trial court, produce no evidence which would support such a finding.[12]

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[4] The defendant Goldt and Cook claimed that they have the right to enjoin, if necessary, the use by plaintiff or its grantees of any part of subdivision B for purposes inconsistent with the restrictions imposed on subdivision A and C. Plaintiff opposes this claim. Plaintiff contends that at no time has he subjected subdivision B to any of the restrictions placed on subdivisions A and C.

[5] "Restrictions intended to limit the use of property to a particular purpose should not be left to implication but should be clearly defined in deed and understood by the parties thereto." Frederick v. Merchants and Marine Bank, 200 Miss. 755, 28 So. 2d 843 (1974). See also 12 Am. Jur., Covenants, Conditions and Restrictions § 212 (n. 4, 5, 6) (1958). See also Annot., 4 A.L.R.2d 1106 (1949).

[6] 14 Am. Jur., Covenants, Conditions and Restrictions § 206 (1958).

[7] Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496, 60 A.L.R. 1202 (1925).

[8] McCusker v. Goode, 185 Mass. 607, 71 N.E. 76 (1904); Bonduranut v. Paducah & I. R. Co., 185 Ky. 794, 218 S.W. 287 (1920); McKenna v. Bregman, 185 N.Y.S. 362 (1920); Beetchenow v. Arter, 45 R.I. 133, 119 Atl. 758 (1923); Beattie v. Howell, 98 N. J. Eq. 163, 129 Atl. 822 (1925); Kunn v. Saum, 316 Mo. 805, 291 S.W. 104 (1927); Stamford v. Vuono, 108 Conn. 359, 143 Atl. 245 (1928); Bristol v. Woodward, 251 N. Y. 275, 167 N.E. 441 (1929); Sweet v. Hollearn, 142 Misc. 408, 254 N.Y.S. 625 (1932); Gibney v. Stockdale Corp., 20 Del. Ch. 272, 174 Atl. 117 (1934); Buffalo Academy v. Boehm Bros., 267 N.Y. 242, 196 N.E. 42 (1935); Moore v. Kimball, 291 Mich. 445, 289 N.W. 213 (1939); Denhardt v. De Roo, 295 Mich. 223, 294 N.W. 163 (1940); Wing v. Forest Lawn Cemetery Asso., 15 Cal. 2d 472, 101 P.2d 1099, 130 A.L.R. 120 (1940); Kessler v. Lower Merion Tp. School Dist., 346 Pa. 305, 30 A.2d 117 (1942); King v. James, 88 Ohio 213, 97 N.E.2d 235 (1950); Broeder v. Sucker Bros., 331 Mich. 323, 49 N.W.2d 314 (1951).

[9] The locus involved was a subdivision planned strictly for residential purposes. The ninety-one lots were platted in 1891, designed and sold solely for residential purposes, and residences were erected on all of the lots. The defendant, owner of one of the lots, acquired title with no restrictions appearing in his chain of title and attempted to construct a filling station upon the lot. The plaintiff, a neighboring lot owner, successfully maintained an injunctive action upon the theory that the defendant's lot was subject to a reciprocal negative easement. The court held that if the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual and that during the period of restraint, the owner of the lot retained can do nothing forbidden to the owner of the lot conveyed. Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496, 60 A.L.R. 1212 (1925). Yet, here, ". . . it will be noted that this was a case of a general building scheme applicable to the entire tract." Sanborn v. McLean, supra, 60 A.L.R. at 1217.

Although the rule stated by this case and supported by the weigh of authority may at first glance seem harsh, it must be borne in min that the ill could have been remedied had the grantee insisted that hi deed contain a covenant that subdivision B, the tract retained by th grantor, should be held and sold subject to the same restrictions as wer imposed upon subdivisions A and C. It is submitted that the doctrin of reciprocal negative easements should be applied with extrem caution, since it involves difficulty and lodges discretionary power in a court of equity, in a degree, to deprive a person of his property b imposing a servitude through implication.

Jack Dubard

TORTS—JOINT OWNERSHIP OF AUTOMOBILE AS CONSTITUTING JOINT ENTERPRISE

Plaintiff-husband was injured in a collision involving an automobile which was jointly owned by plaintiff and wife and which was driven by wife. At the time of the collision, plaintiff, wife, and plaintiff's mother were on a fishing trip. The collision was caused by the joint negligence of plaintiff's wife and defendant motorist. Upon trial, the court found, as a fact, that those in plaintiff's car were engaged in a joint enterprise at the time of the accident, thus imputing the negligence of the wife to the plaintiff and barring his right of recovery. Plaintiff appeals. **Held:** Reversed. Wife's negligence is not imputable to husband as passenger on ground that he had right to control, or on ground that wife was the agent of the husband, or on ground that they were engaged in a joint enterprise. *Sherman v. Korff,* 91 N.W. 2d. 485 (Mich. 1958).

Imputed negligence, the theory whereby the negligence of a driver will be imputed to his passenger and effectively bar any recovery by the passenger, had its beginning in England.[1] Recognized as an undesirable fiction, this theory was overruled in England,[2] and has met with a similar fate in the United States.[3] Michigan was the last state to so rule,[4] thereby making it unanimous that, in the absence of circumstances which would bind the passenger as a co-defendant with the diver, the negligence of the driver will not be imputed to his passenger.[5] However, the negligence of the driver will be imputed to his passenger if it can be shown that the two were engaged in a "joint enterprise."[6] The doctrine of "joint enterprise" has two requirements: (1) a common purpose, (2) a mutual right of contol.[7] There exists a minority of cases which require only a common purpose. Once this common purpose is found, these cases imply the mutual right of control from the community of interest existing in the common purpose.[8] These cases have been ably criticized on the ground that there is an inherent possibility of a common purpose existing in every situation involving two or more persons.[9] The most important aspect of a "joint enterprise" is the mutual right of control. "It is not necessary that the principal should be physically able to so direct or control, but only that he has the right to."[10] That is, it must be understood from the relationship between driver and passenger that they both have the equal right to have their wishes respected.[11] This mutual right of control does not arise from a mere marital[12] or kinship[13] relation; it is generally found where some community of property exists between the driver and the passenger, i.e., when there is a joint ownership or joint hiring of the automobile.[14] Although the doctrine of imputed negligence was buried in the decision of *Bricker v. Green,* it appears that the doctrine of joint enterprise was not a party to the funeral.[15] In upholding the decision of the lower court, the minority justices find ample support in the cases. The minority cite cases holding that a fishing trip constituted a joint venture for pleasure.[16] It is submitted that these cases are subject to the same criticism as those cases which find a common purpose and impute a mutual right of control.[17] They cite further authority which holds that a joint ownership implies a joint control.[18] These cases find support in the *Restatement of Torts,*[19] and possibly represent the trend in Michigan.[20] The majority justices find support in cases which do not regard trips for pleasure and recreation sufficient to constitute a joint enterprise.[21] Also, authority may be found which regards the equation of joint ownership with joint control as an unrealistic fiction.[22]

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[10] See note 9 supra.

[11] It is the elemental duty of one who seeks a summary judgment to assume the burden of proving a general plan of improvement. Rove v. Kenneseth Israel Congregation, 228 Minn. 240, 36 N.W.2d 791 (1949).

[12] The tracts conveyed were not platted prior to their sale. There were no facts in the record indicating a contemplated general plan of improvement and no extrinsic circumstances from which such a plan could have been plausibly implied. The court agreed with the trial court that a general plan of improvement contemplated in connection with the subdivisions here involved could not be found. Mission Covenant Church v. Nelson, 91 N.W.2d 440, 443 (Minn. 1958).

[1] Thorogood v. Bryan, 8 C.B. 115, 137 Eng. Rep. 452 (1849). A passenger on an omnibus was denied recovery on the ground that the negligence of the driver was imputed to the passenger. The passenger was in control of the driver, since he had chosen the means of conveyance.

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[2] Mills v. Armstrong, L. R. 13 A. C. 1 (1888).

[3] "Within a half-century the doctrine of the Thorogood Case was laid to rest as a ficticious extension of the principle of Respondeat Superior." New York, L. E. & W. R. Co. v. Steinbrenner, 47 N.J.L. 161 (1885) citing Little v. Hackett, 116 U.S. 366 (1886).

[4] ". . . the doctrine of imputed negligence has been repudiated everywhere except in Michigan . . . ." Bricker v. Green, 313 Mich. 218, 21 N.W.2d 105, 163 A.L.R. 697, 703 (1946). The Michigan Court subsequently overruled the doctrine in this case.

[5] Annot., 163 A.L.R. 706, (1946).

[6] Prosser, Torts § 65 (2d. ed. 1955).

[7] Annot., 80 A.L.R. 312 (1932).

[8] Prosser, op. cit. supra note 6, at 364.

[9] Comment, 16 Cornell L. Q. 320 (1930-31).

[10] Fox v. Lavender, 89 Utah 115, 56 P.2d 1049 (1936).

[11] Prosser, op. cit. supra note 6, at 365.

[12] Christensen v. Hennepin Transportation Company, 215 Minn. 394, 10 N.W.2d 406, 147 A.L.R. 945, 953 (1943).

[13] See note 9 supra.

[14] See note 10 supra. Clark v. Hampton, 83 N.H. 524, 145 Atl. 265, 61 A.L.R. 1171 (1929). Wosika v. St. Paul City R. Co., 80 Minn. 364, 83 N.W. 386 (1900).

[15] See note 5 supra.

[16] Hopkins v. Golden, 281 Mich. 389, 275 N.W. 184 (1937).

[17] See note 9 supra.

It is admitted that there are two possible conclusions to be drawn from a joint ownership relation.[23] With deference to the *Restatement,*[24] it is believed that the result reached by the majority in the noted case, being more realistic than the presumption espoused by the *Restatement*, is the better result.[25] The decision of the lower court points out the inherent danger of this presumption becoming a rule of law to be applied without regard to the obvious realities of the case.[26] It should be noted that the American Courts have been alone in extending the doctrine of "joint enterprise" beyond it's original scope.[27] A possible solution to the problem would be to restrict this doctrine to business or financial ventures. Such a restriction would place imputation of negligence on it's proper basis—an agency relation.[28]

Harold D. Miller, Jr.

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[18] See note 14 supra.

[19] Restatement, Torts § 491, comment f (1934), "Joint possession of vehicle. The fact that the driver and another riding with him are in joint possession of the vehicle is sufficient to make any journey . . . a joint enterprise . . . . This is so . . . when it results from a joint ownership."

[20] "The Michigan cases, as well as the general trend of decisions elsewhere, appear to me to be summed up in Restatement of the Law of Torts . . . ." Brief for Appellant, p. 20a, quoting from Opinion on Motion for Judgment.

[21] Fox v. Kaminsky, 239 Wis. 559, 2 N.W.2d 199 (1942); Brubaker v. Iowa County, 174 Wis. 574, 183 N.W. 690, 18 A.L.R. 303 (1921).

[22] "Generally, it is the duty of the passenger to sit still and say nothing . . . . Interference, by laying hold of an operating lever, or by exclamation, or even by direction or inquiry, is generally to be deprecated; . . . ." Southern Pacific Co. v. Wright, 248 F. 261, 264 (9th Cir. 1918). "Parties having legal title to a motor vehicle cannot be permitted to contend for the wheel in moving traffic and hence the imputation of negligence upon the theory of equal legal right to domination or control is untenable." Painter v. Lingon, 193 Va. 840, 848, 71 S.E. 2d 355, 360 (1952), quoting Jenks v. Veeder Contracting Co., 177 Misc. 240, 30 N.Y.S.2d 278 affirmed on this point 264 App. Div. 979, 37 N.Y.S.2d 230 (1942); Id., 290 N.Y. 810, 50 N.E.2d 231 (1943).

[23] "It is possible . . . to come to two different conclusions . . . an equally logical conclusion may be reached to the effect that . . . an owner actually driving is not only in complete physical control but has the sole right of control even though a co-owner is riding beside him." Fox v. Lavender, 89 Utah 115, 56 P.2d 1049, 109 A.L.R. 105, 116 (1936).

[24] "Whether or not the quoted illustrative comment is applicable or is still a matter in the unsettled field of the law is a matter about which we have the right to differ." Fox v. Lavender, 89 Utah 115, 56 P.2d 1049, 109 A.L.R. 105, 121 (1936) (dissenting opinion).

[25] "Ownership of an automobile in which the owner is riding, but which is being driven by another, does not establish as a matter of law right of control in the owner. Right of control may be surrendered. Christensen v. Hennepin Transportation Company, 215 Minn. 394, 10 N.W.2d 406, 147 A.L.R. 945, 953 (1943).

[26] It will be noted that the question of joint enterprise was not submitted to the jury, but was decided by the trial judge as a matter of law. Note 27, infra, points out the danger of such a procedure.

[27] Prosser, Torts § 65, at page 363 (2d ed. 1955).

[28] ". . . joint control from which arises a reciprocal agency." Fox v. Lavender,

Torts—Master And Servant—Independent Contractor—Non-Delegable Duty—Inherently Dangerous Work

Trustees of a church brought action against a contractor and a subcontractor for destruction of a church building caused by fire used by subcontractor in clearing and grubbing work preparatory to highway construction. The contractor sought to recover from the subcontractor, who was not originally a party defendant, through a third-party impleader. The United States District Court for the Northern District of Mississippi entered judgment in favor of the trustees against both the contractor and the subcontractor. Held: Judgment for the plaintiff affirmed as to the subcontractor, but reversed as to the contractor. While Mississippi follows the usual principles in contracting out inherently dangerous work, the mere likelihood that a subcontractor might use fire at some time during the work is not a justifiable basis upon which to predicate the liability of a contractor.*Bower & Johnson Construction Company v. White,* 255 F.2d 482 (5th Cir. 1958).

The general rule is that an employer is not liable for the torts of an independent contractor or the latter's servants.[1] This rule is founded upon the principle that a person should not be compelled to answer for the fault or neglect of another over whom he has no control,[2] and that the employer has a right to rely upon the contractor's ability to discharge his legal duties owing to his employees and third persons.[3] This rule, however, is subject to exceptions, one of which relates to work which is inherently dangerous.[4] Where work is inherently dangerous, there is a non-delegable duty owing to third persons to take precautions to prevent injuries.[5] The "inherent danger" doctrine was first propounded by the American courts,[6] and has never been recognized in England.[7] England follows a separate but similar doctrine which originated in the famous case of *Bower v. Peate.*[8] The proper

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89 Utah 115, 56 P.2d 1049, 109 A.L.R. 105, 119 (1936). "It would seem to be an obvious fallacy to carry what is simply the test of the existence of the master-servant relation into a field where that relation admittedly does not exist and there use it as a test of liability. Yet this is precisely probably what has happened." Comment, 16 Cornell L. Q. 320, 335 (1930-31).

[1] Looker v. Gulf Coast Fair, 203 Ala. 42, 81 So. 832 (1919); Robideaux v. Herbert, 118 La. 1089, 43 So. 887 (1907); Pickett v. Waldorf System, 241 Mass. 569, 136 N.E. 64 (1922); New Orleans, B. R. V. & M. R. Co. v. Norwood, 62 Miss. 565 (1885); Besner v. Central Trust Co., 230 N.Y. 357, 130 N.E. 577 (1921); Medley v. Trenton Invest. Co., 205 Wis. 30, 236 N.W. 713 (1931).

[2] Bass v. Kansas City Journal Post Co., 347 Mo. 681, 148 S.W.2d 548 (1941).

[3] Kaw Boiler Works v. Frymyer, 100 Okl. 81, 227 Pac. 453 (1924); O'Connor v. Narrangansett Electric Co., 54 R.I. 317, 172 Atl. 889 (1934).

[4] Mallory v. Louisiana Pure Ice & Supply Co., 320 Mo. 95, 6 S.W.2d 617 (1928).

[5] Hanneken v. Eichler, 75 N.E.2d 244 (Ill. 1947); Andronick v. Daniszewski, 268 Ill. App. 543 (1932); Nashville Bridge Co. v. Marsh, 212 Ky. 728, 279 S.W. 1099 (1926); Blount v. Tow Fong, 48 R.I. 453, 138 Atl. 52 (1927); Loyd v. Herrington, 143 Tex. 135, 182 S.W.2d 1003 (1944); Missouri Valley Bridge & Iron Co. v. Ballard, 53 Tex. Civ. App. 110, 116 S.W. 93 (1909).

[6] Earliest instance of the use of the phrase "intrinsically dangerous" occurs in Dillon, Municipal Corporations, § 792 (1st ed. 1872). Therefore, it seems that this phrase was introduced into law by him.

[7] Annot., 23 A.L.R. 1086, note 5 (1923).

[8] 1 Q.B.D. 321 (1876). Cockburn, Ch. J., stated the doctrine as follows: "a man who orders a work to be executed, from which in the natural course of things,

test, it has been said, is whether danger inheres in the performance of the work;[9] and it is sufficient if there is a recognizable danger inherent in the work,[10] even though a major hazard is not involved.[11] Work held to be inherently dangerous, for which the employer cannot escape liability by delegating it to another, includes: excavations in or near a public highway,[12] construction or repair work on buildings adjoining it,[13] the spraying of poison,[14] tearing down high walls or chimneys,[15] the construction of a dam,[16] among others.[17] The cases indicate that the principle seems to be limited to work in which there is a high degree of risk in relation to the particular surroundings.[18] Thus, work held not inherently dangerous includes: constructing a telephone line,[19] cutting down trees in a forest,[20] grading and improving a street,[21] and laying a pipe line.[22] With respect to the use of fire for the purpose of clearing land, some cases hold that it is inherently dangerous and may not be delegated.[23] In others a contrary conclusion is reached.[24] Still others hold that it depends upon the facts of the particular case.[25] The result reached by most of the cases seems to be that if the contract

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injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

[9] Scales v. Lewellyn, 172 N. C. 494, 90 S.E. 521 (1916).

[10] Evans v. Elliott, 220 N.C. 253, 17 S.E.2d 125 (1941).

[11] Ibid.

[12] Thomas v. Harrington, 72 N.H. 45, 54 Atl. 285 (1903); McCarrier v. Hollister, 15 S.D. 366, 89 N.W. 862 (1902); Olah v. Katz, 234 Mich. 112, 207 N.W. 892 (1926).

[13] Campus v. McElligott, 122 Conn. 14, 187 Atl. 29 (1936); Whalen v. Shinek, 326 Mass. 142, 93 N.E.2d 393 (1950).

[14] McKennon v. Jones, 219 Ark. 671, 244 S.W.2d 138 (1951); Alexander v. Seaboard Air Line R. Co., 221 S.C. 477, 71 S.E.2d 299 (1952); S. A. Gerrard Co. v. Fricker, 42 Ariz. 503, 27 P.2d 678 (1933).

[15] Covington & C. Bridge Co. v. Steinbrock & Patrick, 61 Ohio St. 215, 55 N.E. 618 (1899); Hanley v. Central Savings Bank, 255 App. Div. 542, 8 N.Y.S.2d 371 (1938).

[16] Trump v. Bluefield Waterworks & Improvement Co., 99 W. Va. 425, 129 S.E. 309 (1925).

[17] Medley v. Trenton Inv. Co., 205 Wis. 30, 236 N.W. 713 (1931), (exterminating bedbugs); Alabama Power Co. v. McIntosh, 219 Ala. 546, 122 So. 677 (1929), (cleaning floors with gasoline).

[18] Thus the employer has been held not liable for blasting in an uninhabited area. Holt v. Texas-New Mexico Pipeline Co., 145 F.2d 862 (5th Cir. 1945).

[19] Vosbeck v. Kellogg, 78 Minn. 176, 80 N.W. 957 (1899).

[20] Young v. Fosburg Lumber Co., 147 N.C. 26, 60 S.E. 654 (1908).

[21] Seattle Lighting Co. v. Hawley, 54 Wash. 137, 103 Pac. 6 (1909).

[22] Lone Star Gas Co. v. Kelly, 46 S.W.2d 656 (Tex. 1932).

[23] Inglis v. Millersburg Driving Assoc., 169 Mich. 311, 136 N.W. 443 (1912); St. Louis & S. F. R. Co. v. Madden, 77 Kan. 80, 93 Pac. 586 (1908); Cameron v. Oberlin, 19 Ind. App. 142, 48 N.E. 386 (1897); Black v. Christchurch Fin. Co., A. C. 48, 63 L.J.P.C. 32 (1894).

[24] Ferguson v. Hubbell, 97 N.Y. 507, 49 Am. Rep. 544 (1884); Shute v. Princeton Township, 58 Minn. 337, 59 N.W. 1050 (1894).

[25] St. Louis I. M. & S. R. Co. v. Yonley, 53 Ark. 503, 14 S.W. 800 (1890).

contemplated the use of fire in clearing the land the employer is liable,[26] as fire is a dangerous and destructive agency.[27]

Mississippi follows the usual principles on contracting out inherently dangerous work.[28] The theory of non-delegable duty is that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.[29] Thus, a responsible person should be held liable. The majority of the court, in the principal case, admits that the evidence supports an implied finding that those engaged in highway construction frequently light fires to burn trash or debris. It is submitted, therefore, that there was ample basis for the court to have adopted the view of the dissenting judge, Chief Judge Hutcheson, and ruled that there was a non-delegable duty of the contractor with respect to the setting of the fires.

J. Michael Corrigan, Jr.

TRUSTS—BREACH OF AN ORAL AGREEMENT TO PURCHASE LAND FOR THE JOINT BENEFIT OF THE PARTIES AS CONSTITUTING GROUNDS FOR A CONSTRUCTIVE TRUST

Plaintiff and defendant, True, orally agreed to jointly purchase certain property which the plaintiff had learned was for sale. They agreed that the defendant would negotiate and the purchase and would secure financing to enable them to close the transaction. True secured an option on the property upon payment of ten thousand dollars ($10,000) furnished by the plaintiff. Though the plaintiff constantly conferred with the defendant in regard to the property, True took a deed in his name and conveyed it to the defendant, Beach, who in turn conveyed to defendant, Leedy & Co. The plaintiff brought this action seeking to impress a constructive trust upon the property involved, alleging that the defendants "conspired and connived to defraud" him of the property. HELD: Reversed. "Fraud cannot be predicated upon statements which are promisory in their nature as to future acts." *Beach v. Fleming,* 104 S.E.2d 427 (Ga. 1958).

While it is generally recognized that representations which authorize an action for fraud and deceit must be made with reference to past or present facts, not future acts,[1] it is submitted that the question in the principal case was not whether there was representation sufficient to predicate an action of fraud, but whether the circumstances of the case were sufficient to justify a court of equity in impressing a constructive trust upon the land. A constructive trust, or as it is frequently called, a trust ex maleficio, is a trust raised by equity in respect of property which has been acquired by fraud, actual or constructive,[2] or where acquired originally without fraud, it is against equity and good conscience that it should be retained by the person holding it.[3] It has been said that constructive trusts are divided into two general classes: one consisting of those cases in which fraud is considered as an equitable ground for raising the trust;[4] and the other consisting of those cases in which the existence of a confidential relation, and subsequent abuse of the confidence reposed, is sufficient to allow the court to impress a trust upon the property in question. So, where the parties to the transaction did in fact occupy a fiduciary or confidential position and there is a subsequent breach of the relation, a constructive trust arises, independently of any imputation of fraud,[5] and without requiring any proof of an intention to violate the existing fiduciary obligation[6]—because it is assumed that the purchaser intended to act in pursuance of his fiduciary duty.[7] There is also authority which holds that a breach by an agent of his fiduciary relationship toward his principal is itself a fraud sufficient to predicate a constructive trust.[8] While, in the absence of fraud, it would appear that there must be a fiduciary or confidential relationship between the parties, it is not at all clear just what constitutes this relationship.[9] It has, however, been said that the origin of the relationship "may be moral, social, domestic, or merely personal."[10] The application of a constructive trust to specific situations causes a great deal of difficulty, especially where, as in the principal case, the petition seeks to enforce the defendant's oral agreement to purchase land on behalf of the complaintant by impressing the land with a trust. In such a situation the courts find themselves faced with a seemingly insurmountable barrier in the Statute of Frauds.[11] Some courts have felt that to admit oral proof that the purchase was for the joint benefit of the purchaser and complaintant is virtually to abrogate the Statute;[12] while others regard the agreement as creating a relationship of trust and confidence, a violation of which will give rise to a constructive trust[13] thus making the Statute of Frauds inapplicable.[14] Application of these two opposing principles to similar fact situations has led to a remarkable conflict of authority and has made any attempted reconcillation of the cases a virtual impossibility.[15] However, it is submitted that the better rule is followed by those courts which circumvent the Statute and allow a recovery on the grounds that the wrongful purchaser is a constructive trustee. Otherwise, the Statute of Frauds becomes an instrument of fraud and oppression, and, therefore, aids in accomplishing the very thing which it was intended to prevent.[16]

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[26] Symons v. Allegany County, 107 Md. 254, 65 Atl. 1067 (1907); Winniford v. MacLeod, 68 Ore. 301, 136 Pac. 25 (1913); Seattle Lighting Co. v. Hawley, 54 Wash. 137, 103 Pac. 6. (1909).

[27] Gloster Lumber Co. v. Wilkinson, 118 Miss. 289, 79 So. 96 (1918).

[28] Nasif v. Hawkins, 212 Miss. 834, 55 So.2d 497 (1951); Yazoo & M. V .R. Co. v. Gordon, 184 Miss. 885, 186 So. 631 (1939).

[29] Prosser, Torts § 64 (2d ed. 1955).

[1] Monroe v. Goldberg, 80 Ga. App. 770, 57 S.E.2d 448 (1950); Salitan v. Horn, 212 Miss. 794, 55 So.2d 444 (1951); Prosser, Torts § 86-89 (2d ed. 1955).

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[2] In Midtown Chains Hotel Co. v. Merriman, 204 Ga. 71, 48 S.E.2d 831, 832 (1948), it is stated: "'Constructive fraud' while involving no moral guilt as does actual fraud, implies a breach of legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience." See also Haywood Publishing Co. v. West, 110 Ind. App. 568, 39 N.E.2d 785 (1942); Goodrich v. Waller, 314 Mich. 456, 22 N.W.2d 862 (1946).

[3] Quinn v. Phipps, 93 Fla. 805, 113 So. 419 (1927); Kochorimbus v. Maggos. 232 Ill. 510, 154 N.E. 215 (1926); Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943); Anding v. Davis, 38 Miss. 574, 77 Am. Dec. 658 (1860); Weir v. Kansas City, 356 Mo. 882, 204 S.W.2d 268 (1947).

[4] Newell v. Tweed, 241 Iowa 90, 40 N.W.2d 20 (1949); Long v. Huseman, 186 Md. 495, 47 A.2d 75 (1946); Paul v. McGahan, 152 Neb. 578, 42 N.W.2d 172 (1950).

[5] Digby v. Thorson, 319 Mich. 524, 30 N.W.2d 266 (1948); McCreary v. Shields, 333 Mich. 290, 52 N.W.2d 853 (1952); Deming v. Lee, 174 Ala. 410, 56 So. 921 (1911); Wood v. Rabe, 96 N.Y. 414, 48 Am. Rep. 640 (1884); 3 Pomeroy, Equity Jurisdiction § 1049 (3d ed. 1941). Contra, Dotson v. Dotson, 307 Ky. 106, 209 S.W.2d 852 (1948); Scribner v. Meade, 10 Ariz. 143, 85 Pac. 477 (1906).

[6] In Sieger v. Sieger, 162 Minn. 322, 202 N.W. 742, 744 (1925), it is stated that a constructive trust ". . . arises by operation of law without any reference to any actual or supposed intention of creating a trust, and frequently directly contrary to such intention." See also Kern v. Rubin, 338 Mich. 288, 61 N.W.2d 9 (1953); Sanford v. Hamner, 115 Ala. 406, 22 So. 117 (1896); Deming v. Lee, 174 Ala. 410 56 So. 921 (1911).

[7] Peabody v. Fellows, 177 Mass. 290, 58 N. E. 1019 (1901); Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696 (1866).

[8] In Sorrell v. Sorrell, 198 N.C. 460, 152 S.E. 157, 160 (1930), the Court said: ". . . the law presumes fraud in transactions where confidential relationships existed between the parties." Also see Havner Land Co. v. MacGregor, 169 Iowa 5, 149 N.W. 617 (1914); Raper v. Thorn, 202 Okla. 235, 211 P.2d 1007 (1949).

[9] Risk v. Risher, 197 Miss. 155, 19 So.2d 484 (1944), states that, "The fiduciary relation is not restricted to such confined relations as trustees and beneficiary . . . but applies to all persons who occupy a position out of which the duty of good faith ought in equity and good conscience to arise." In Roby v. Colehour, 135 Ill. 300, 225 N.E. 777 (1890), it was said: "Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that others and perhaps new cases might be excluded." See also Quinn v. Phipps, 93 Fla. 805, 113 So. 419 (1927).

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[10] Kochorumbus v. Maggos, 323 Ill. 510, 154 N.E. 235 (1926). See Harrop v. Cole, 85 N.J. Eq. 32, 95 Atl. 378 (1915), in which it is said: "As the authorities abundantly show, equity will not tolerate the betrayal of confidence, and it makes no difference how this confidence has been obtained." In Kochorumbus v. Maggos, supra at 154 N.E. 238, Justice Heard said, "If the confidence in fact exists, is opposed by the one party, and accepted by the other, the relation is fiduciary, and equity will regard dealings between the parties according to the rules which apply to such relations."

[11] About two-thirds of the states have statutes similar to the seventh section of the early English Statute of Frauds, requiring trusts of land to be in writing. However, at least thirty five states exempt constructive trusts from the Statute, either by legislation or by judicial construction.

[12] In Raub v. Smith, 61 Mich 543, 28 N.W. 676 (1886), where one who had ascertained the existence of timber on land induced another to join him in the purchase, with the oral understanding that the latter should pay the purchase price, take the land for the benefit of both and convey to the former when he paid one half of the purchase price, it was held that the Statute of Frauds prevented the enforcement of the agreement. See also e.g., Clawater v. Tetherow, 27 Mo. 241 (1858); McDonald v. Conway, 254 Mass. 429, 150 N.E. 200 (1926); Talley v. Talley, 248 Ala. 84, 26 So.2d 586 (1946); Cain v. Keeley, 129 W. Va. 642, 41 S.E.2d 185 (1946).

[13] In Kochorumbus v. Maggos, 323 Ill. 510, 154 N.E. 235 (1926), where the plaintiff found certain land and orally agreed with the defendant that defendant would purchase for their joint benefit and convey a half interest to the plaintiff upon plaintiff's subsequent payment of half the purchase price, it was held that the defendant was a trustee ex maleficio, notwithstanding the Statue of Frauds. See also e.g., Peabody v. Fellows, 177 Mass. 290, 58 N.E. 1019 (1901); Russell v. Wade, 146 N.C. 116, 59 S.E. 345 (1907); O'Bryne v. McNeill, 90 Colo. 226, 7 P.2d 956 (1932); Lamb v. Sandall, 135 Neb. 300, 281 N.W. 37 (1938); Raper v. Thorn, 202 Okla. 235, 211 P.2d 1007 (1949); Poe v. Poe, 208 Okla. 406, 256 P.2d 153 (1952).

[14] See notes 11 and 13, supra.

[15] Compare Kochorumbus v. Maggos, 323 Ill. 510, 154 N.E. 235 (1926), with Raub v. Smith, 61 Mich. 543, 28 N.W. 676 (1886). Compare McDonald v. Conway, 254 Mass. 429, 150 N.E. 200 (1926), with Harrop v. Cole, 85 N.J. Eq. 32, 95 Atl. 378 (1915). Compare Lamb v. Sandall 135 Neb. 300, 281 N.W. 37 (1938), with Scribner v. Meade, 10 Ariz. 143, 85 Pac. 477 (1906).

While it may be true that the plaintiff in the principal cas failed to allege facts sufficient to predicate an action of fraud, i should be noted that the legal action of deceit is wholly unrelated t the equitable doctrine of constructive trust.[17] It also seems that "fraud which gives rise to a constructive trust is different from "fraud" a that term is used in an action of deceit.[18] Thus, while an action o deceit would not lie, it is submitted that the plaintiff in the principa case did allege facts sufficient to give rise to a constructive trust, fo there is ample authority upon which the Court could have relied i finding the existence and breach of a confidential relationship[19] sufficient to give rise to such a trust, regardless of any imputation o fraud.[20]

Newt P. Harrison

USURY—LOAN BROKER ACTUALLY LENDER UNDER STATUTE

The defendant signed an application requesting a loan service t obtain for her a loan ($25.00) from some person and was told there would be a $13.00 brokerage fee for securing the loan. The mone was obtained from a firm composed of the brothers and sisters of th principal stockholder of the loan service and the brokerage fee retained by the loan service. The loan service made no loans for anyon other than this firm. The plaintiff brought suit to obtain possessio of the defendant's household furniture, the security for the loan. Th lower court held for the plaintiff and the borrower appealed. **HELD:** Reversed. Actual business of making loans was being conducted b the loan service; it was in fact a lender and not a broker, and the interest was usurious. *Richardson v. Cortner,* 100 So. 2d 854 (Miss. 1958).

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[16] In Deming v. Lee, 174 Ala. 410, 66 So. 921, 922 (1911), Justice Simpson said ". . . an oral contract for the sale of land is void under our Statute of Frauds and cannot be enforced, but, in the language of Judge Pomeroy: 'It is a most important principle, thoroughly established in equity, and applied in every transaction where the Statute of Frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding th party who relies upon it in the perpetration of a fraud, or in the consumatio of a fraudulent scheme."

[17] Prosser, Torts § 86 (2d ed. 1955) states: "To the difficulties arising from the existence of these three strictly legal remedies [deceit, negligence, and warranty], there must be added the further confusion resulting from the possibility of equitable relief . . . The particular form of relief granted by equity might be almost anything appropriate to the particular case; but the most common remedies for misrepresentation were . . . requiring a defendant who had been unjustly enriched to hold money or property he had received subject to a constructive trust."

[18] "The equity courts were not bound by rules adopted at law, and proceeded to evolve their own definition of 'fraud' which would justify relief." Prosser, Torts § 86 (2d ed. 1955).

[19] In Lamb v. Sandall, 135 Neb. 300, 281 N.W. 37 (1938), which is similar to the principal case, the court found the existence of an agency relationship and stated: "Where one employed to act as the agent for another in the purchase of real estate becomes the purchaser himself he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money . . . ." See note 9 supra.

[20] See note 6 supra.

The Mississippi Legislature has condemned usury as against public policy and has provided that the principal and all interest shall be forfeited if a rate is contracted for or received in excess of twenty per cent.[1] The taking of excessive interest was not looked on favorably at common law, although the exaction of usury was not forbidden.[2] Rights of debtors growing out of usurious contracts are created solely by statute.[3] Thus, several Mississippi cases have called for strict construction of usury statutes and emphasized that the proof of usury must be clear, positive, and certain.[4] The decision in these cases turned on a strict construction by the Court of the phrase, "must be contracted for or received." However, the Supreme Court, in 1957, seemed to turn to a more liberal interpretation of this phrase and held a note usurious if the lender received directly or indirectly a rate of interest greater than twenty per cent.[5] Numerous cases hold that the courts will look through the form of the transaction to the actual facts and substance and will permit no devices to hide the face of usury.[6] The courts will not tolerate devices to defeat the statutory purpose when the consummation of usury is really intended.[7] In holding that the brokerage fee exacted here was in actuality a usurious interest payment, the court aligned itself with the great weight of authority in the United States which is that lenders who seek to evade usury satutes by pretending to act as brokers are guilty of usury when excessive "brokerage fees" are charged.[8]

Shortly after the decision in this case, the Mississippi Legislature enacted two small loan regulatory statutes which took effect on July 1, 1958. In an earlier case the Supreme Court had called the Legislature's attention to the dire need for regulation of the small loan

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[1] ". . . If a rate of interest is contracted for or received, directly or indirectly, greater than twenty per centum per annum, the principal and all interest shall be forfeited, and any amount paid on such contract may be recovered by suit." Miss. Code Ann. § 36 (1942).

[2] 91 C.J.S., Usury § 2 (1955).

[3] "Rights of action or defense on account of usury are not a part of the common law, but are solely the creation of statutes which are in the nature of regulations in the public interest." Deposit Guaranty Bank & Trust Co. v. Williams, 193 Miss. 432, 9 So. 2d 638 (1942).

[4] Yeager v. Ainsworth, 202 Miss. 747, 32 So. 2d 548 (1947); Morgan v. King, 128 Miss. 179, 91 So. 30 (1922); Fry v. Layton, 191 Miss. 17, 2 So. 2d 561 (1941); Byrd v. Link-Newcomb Mill & Lumber Co., 118 Miss. 179, 79 So. 100 (1918).

[5] "The fact that the appellant and the appellee did not contract or stipulate for a greater rate of interest than twenty per cent does not prevent the note from being usurious . . . ." Cortner v. Bennett, 92 So. 2d 559 (Miss. 1957).

[6] Alt v. Bailey, 211 Miss. 547, 52 So. 2d 283 (1951); Hiller v. Ellis, 72 Miss. 701, 18 So. 95 (1895); Brown v. West, 80 Miss. 764, 32 So. 52 (1902); Kennedy v. Porter, 176 Miss. 742, 170 So. 286 (1936); Bell v. Tindall, 215 Miss. 343, 60 So. 2d 801 (1952). See also 91 C.J.S., Usury § 11 (1955); 55 Am. Jur., Usury § 14 (1956).

[7] Hardin v. Grenada Bank, 182 Miss. 689, 180 So. 805 (1938).

[8] "Where the actual lender, in order to evade the statute, pretends to act as agent or broker, and exacts a commission for his supposed service in procuring the loan from a third person, the court, upon proof of the deceptive character of the transaction, will declare it usurious." Annot., 21 A.L.R. 810 (1922).

"brokering system" in this state.[9] The two statutes are designated as the "Small Loan Privilege Tax Act"[10] and the "Small Loan Regulatory Act."[11] The "Small Loan Regulatory Act" virtually eliminates the type of loan service involved in this case, for it "provides that no licensee shall do a business of both handling loans (brokering) and lending money (direct lending), nor 'shall a person doing business of handling loans as defined herein be the owner of, have any share or interest in, directly or indirectly, or be financially interested in any manner in any person lending money as defined herein' . . . ."[12]

The facts of the instant case demonstrate that it was correctly decided. There was an attempt to circumvent the usury statute by a complex scheme. Perhaps one of the best arguments for the correctness of this decision could be obtained from an early decision of the U. S. Supreme Court as follows: "Usury is a moral taint wherever it exists, and no subterfuge will be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they vary only as they follow the detours through which they have had to pursue the money-lender."[13] The small loan regulatory statutes passed by the 1958 Legislature were badly needed in this state. It remains to be seen just how effective these statutes will be in curbing schemes to exact usurious interest rates.

Charles L. Brocato

ZONING LAW—THE ELIMINATION OF NONCONFORMING USES

Since 1924, petitioner had operated a barrel reclaiming business, classified by the city for licensing purposes as a junk yard. A 1953 ordinance provided that certain categories of nonconforming uses in districts zoned residential either cease or be changed to conforming uses within 3 years from the effective date of the ordinance. In 1956 petitioner was unable to obtain a wholesale junk license, and was ordered by the city director of licenses to discontinue the operation of his junk yard at once. Petitioner brought a proceeding in the nature of mandamus against the city and its director of licenses to direct the issuance of a wholesale junk license. The Supreme Court entered an order directing issuance of a license on the ground that the ordinance was not a valid exercise of police power. HELD: Reversed. [Nonconforming uses] ". . . may be terminated after a reasonable period, during which the owner may have a fair opportunity to amortize his investment and to make future plans." *Harbison v. City of Buffalo,* 4 N.Y.2d 553, 152 N.E.2d 42 (1958).

The constitutionality of zoning ordinances was not firmly established until 1926, when the Supreme Court held them to be within the police power unless arbitrary and unreasonable.[1] Jurisdictions which had previously invalidated such ordinances soon swung into line.[2] Existing nonconforming uses were almost universally protected in early ordinances and enabling statutes, perhaps to lessen the oppostion to them.[3] It was contemplated that such nonconforming uses would be eliminated gradually with time.[4] A number of devices have been used to hasten the process, such as restriction on repairs[5] and rebuilding.[6] Experience, however, indicates that such measures are largely ineffective because nonconforming businesses tend to thrive as a result of their monopolistic positions.[7]

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[9] "But, the problem thus presented is one for the Legislature, and is not for the courts in the absence of clear, positive and certain proof that more interest is received as such than is allowed by Section 36, Code of 1942." Tower Underwriters v. Lott, 210 Miss. 389, 49 So. 2d 704 (1951).

[10] Advance Sheet 4, General Acts of Miss., 1958, H.B. No. 40.

[11] Advance Sheet 4, General Acts of Miss., 1958, H.B. No. 42.

[12] Personal Finance Law Quarterly Report, No. 3, p. 78.

[13] DeWolf v. Johnson, 23 U.S. (10 Wheat.) 367 (1825).

The problem of eliminating nonconforming uses was first effectively (and still most drastically) dealt with in Louisiana,[8] where an ordinance requiring a nonconforming drug store in a residential district to close within one year was held to be constitutional.[9] These cases have been severely criticized,[10] but a growing number of jurisdictions have recognized the practical necessity of putting a time limit on the continuation of existing nonconforming uses,[11] though none have attempted to impose a period as short as that allowed in Louisiana. These jurisdictions have allowed the nonconforming use to continue for a period of time sufficient to amortize the business. Amortization appears to be a practical and fair method of dealing with the problem.[12] However, it does not seem wise to set an inflexible period within which all nonconforming uses are to be eliminated,[13] as this can become arbitrary and unreasonable in individual cases. It is submitted that a fixed minimum period, during which all existing nonconforming uses that are not classified as common law nuisances may be continued, with a flexible maximum period, determined on the basis of what is reasonable under the circumstances surrounding the particular business, can be utilized with effectiveness.[14]

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[1] Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[2] ". . . [A]long with nearly all the courts, we have been compelled to see and appreciate that the modern zoning law is essential to meet the requirements of modern conditions." City of Jackson v. McPherson, 162 Miss. 164, 138 So. 604 (1932). See Metzenbaum, The History of Zoning—A Thumbnail Sketch, 9 Western Res. L. Rev. 36 (1957).

[3] ". . . [T]he right of an owner to continue to exercise a nonconforming use is a property right, a part of the land title, that could only be extinguished by acts or omissions indicating an intention to abandon it." Scavone v. Totawa, 49 N.J. Super. 423, 140 A.2d 238 (1957). For the state of the law in New York prior to the instant case, see People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952): "It is the law of this state that nonconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance."

[4] "The intention of the zoning act as regards a use of the nonconforming property is to restrict any increase of any nonconforming use." Fulford v. Board of Zoning Adjustment of the City of Dothan, 256 Ala. 336, 54 So. 2d 580 (1951).

[5] Fratcher, Zoning Ordinances Prohibiting Repair of Existing Structures, 35 Mich. L. Rev. 642 (1937).

[6] ". . . [W]e are unable to say . . . that the ordinance in prohibiting the restoration of a commercial building in a residential area after the building has been destroyed to more than fifty percent of its value is an unreasonable exercise of the police power." Palazzola v. City of Gulfport, 211 Miss. 737, 52 So. 2d 611 (1951).

[7] Note, Nonconforming Uses A Rationale and an approach, 102 U. Pa. L. Rev. 91, 94 (1954).

[8] ". . . [A]ny business operated or maintained in violation or in defiance of a zoning ordinance is to be regarded as a public or common nuisance." State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, 614 (1929). Speaking of the Euclid case, note 1 supra, the court said, ". . . [I]f the village had the authority to create and to maintain a purely residential district, which the court held it did have, and if such an ordinance was not arbitrary and unreasonable, it follows necessarily that the village was vested with the authority to remove any business or trade from the district and to fix a limit of time in which the same shall be done." State ex rel. Dema Realty Co. v. McDonald, supra at 617; See also State Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929).

[9] State ex rel. Dema Realty Co. v. Jacoby, supra note 8.

[10] "The Louisiana decisions in this field, however, sounds more like Cossack interpretations of Muscovite ukases than utterances of a court operating under the benignant provisions of Magna Carta." Fratcher, op. cit. supra, note 5, at 644.

[11] Los Angeles v. Gage, 127 Cal. App. 2d. 442, 274 P.2d 34 (1954); Livingston Rock & Gravel Co. v. Los Angeles, 43 Cal. App. 2d 121, 272 P.2d 4 (1954); Standard Oil Co. v. Tallahassee, 183 F.2d 410 (5th Cir. 1950).

Clyde O. Hurlbert

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[12] Note, Amortization of Property Uses Not Conforming to Zoning Regulations, 9 U. Chi. L. Rev. 477 (1942).

[13] In the instant case, had the court considered 3 years a clearly unreasonable period for the amortization of petitioner's business, a different result may have been reached. The court said: "In ascertaining the reasonable period during which an owner of property must be allowed to continue a nonconforming use, a balance must be found between social harm and private injury." Harbison v. City of Buffalo, 152 N.E.2d at 46.

[14] For further discussion on the problem of nonconforming uses, see: Harvey, Elimination of Nonconforming Uses, 6 Western Res. L. Rev. 182 (1955); Willis, The Elimination of Nonconforming Uses, 1951 Wis. L. Rev. 685.

RECENT BOOKS

THE GOOD SOCIETY

By Hugh Evander Willis. New York: Vantage Press,
1958. $4.50, Pp. 642.

This book is a blueprint for the building of a new social order, or the good society, on the foundation of all past human experience. In the good society love will supplant hate, humility will supplant pride, self-sacrifice will supplant selfishness, goodwill will supplant greed, peace will supplant war, science will be applied to the problems of life, leadership in the service of the common good will be given to the ablest, and the human race will at last accomplish its divine destiny.

The following synopsis is intended to give the reader of this review an understanding of the author's arguments and views, all of which are not shared by this reviewer.

The universe is incomprehensible without God, and the phenomena of nature cannot be explained by chance, but only by purpose. Evolution is irreversibly progressive and is dominated by a finality which has set the goal but not the means for attainment of the goal. Religion, law, all the fundamentals of the good society, and man himself, are the results of evolution. God abdicated some of his omnipotence by giving man free will, or personal liberty, so that to some extent man may transcend nature. Man has probably reached the end of his evolution physically; while man is a sort of ex-animal, his physical body is a fit temple for the soul; and all further evolution will be in the direction of the intellect and morals. Further evolution will depend on man in the exercise of his liberty. God refuses to interfere with man by making him do right.

Man is still born with the same fears, hates, desires, appetites, and instincts with which primitive man was born, for which reason men do not desire to be merciful, pure in heart, unavaricious, sincere, kindly in speech, and of good will.

The good society has not developed in the United States because the family, churches, and schools have failed to give training in moral standards and spiritual ideals. All these agencies have done some good, but all have failed to do enough to bring about the good society. Primarily this is a job for the churches, but they failed because too much emphasis has been placed on teaching dogmas and creeds rather than what Jesus actually taught.

The Kingdom of Heaven idea, taught by Jesus, was the product of evolution, from primitive religion to pagan, to sacrificial, to one God. Jesus took the Hebrew religion at the time of Isaiah II as the foundation of the new principles Jesus gave it. Hebrew law went through virtually the same stages of development as did Roman and Anglo-American law, and other systems of law. First there was a period of vengeance, self-help, and private warfare. This was modfied by the patriarchal system. Then came the regulation of vengeance, first by the sanctuary of the altar and later by the pronouncement of dooms.

After a long process came the third stage of the evolution of the Hebrew law by the substitution of law for private vengeance and self-help. As a result of this development, there finally evolved a complete system of private and public law including torts, crimes, property, contracts, and family law. This was the substantive and adjective law at the time of Jesus when He said He came not to do away with the law. The Kingdom of Heaven idea was the final flowering of all prior Hebrew law and religion. It was created by Jesus, but is not a Kingdom and it is not in Heaven, but a Heavenly, democratic way of living on earth. Jesus recognized the need of law, but His was the better way than the legal way for protecting social interests and the fundamentals of the good society; and that way was the way of self-control instead of external social control by law. Jesus had nothing but praise for the law; the relation between the law and the gospel was complementary; for both have a common aim—a better society. Both law and the gospel are needed. Until people voluntarily follow the way of the gospel, we must put our chief dependence in the law. But both methods have failed to give the world a good society; the law because of legal practitioners; the gospel because of religious practitioners. There is nothing much wrong with the substantive law; the defects are in procedure.

The best government, if not the only kind, for the attainment of the good society, is democracy, a form of society under which the whole people rule themselves by majority vote, either directly or through representatives of their own choosing, in order to enjoy the blessings of liberty, equality, and a homogeneous culture for the common good. It represents the triumph of a functional social group over tribal individualism (Father, King, etc.) on the one hand, and uncontrolled, undirected political power (mobocracy), on the other.

The Constitution of the United States cannot be understood by those who believe that judges never make law. At least half of the present Constitution has been made by the judges, and knowledge of this fact is the key to understandng the Constitution.

The fundamentals of the good society should be taught in the schools, colleges, and Sunday Schools. But this kind of reform would be met with opposition from the students who have been taught to want football, basketball, fraternities, sorority functions, queens, parades, dances, bicycle races, turtle races, and hitchhiking vacations from Friday until Monday.

The only way to end war, the greatest of all crimes, is to establish a federation of the nations of the world and thereby substitute international law for warfare, just as law was substituted for private warfare between individuals. Human history points to the inescapable facts that law, and nothing but law, is capable of maintaining the peace.

Life and personal safety is a social interest and is an innate right acquired at birth. It is recognized by the law and the Gospel, but they have not succeeded in protecting this right. The record of crime and automobile accidents is appalling. Young people are fouling their minds with intellectual garbage through the movies, radio, television, and comic books purveying mauldin, senseless drivel, sex, westerns, gangsterism and criminality, cheap moronic social life, and Henry Aldrich type of intellectuality. More and more crimes are committed by juveniles. Youth, autos, and alcohol are a menace to life and safety.

The law and the Gospel recognize the social interest in family. In modern times the State is replacing the father; there are too many divorces; and the family is threatened with collapse as it did in ancient Greece and Rome. The cure for the causes of the disintegration of the family must be found if our civilization is to survive. This must come about by reforming the law and religion.

Property is another social interest recognized by the law and the Gospel. Contracts, a species of property, was early recognized by all systems of law. It is doubtful if we could have a good society without the protection of these rights.

There are many other social interests recognized by the law, and many more that are recognized by the Gospel, some of which are extensions of legal social interests. The social interests recognized by the law do not go far enough. Jesus introduced the social interests of mercy, purity, sincerity, kindly speech, and good will, but these are not legal social interests because of the infeasibility of protecting them by legal means.

The greatest instrumentalities for the creation of the good society are family, government (including its law), schools, and the church. Neither has wholly failed, but failures have been greater than successes. The family, schools, and churches have failed because they have failed to give moral and spiritual training, and government has failed to apply them. Schools have been a success quantitatively, but not qualitatively; they have not given students systematic, disciplined, intellectual training. They have not emphasized intellectual values. Instead they have emphasized the art of material aggrandizement and horse play to the sacrifice of brain power, articulateness, self-discipline, and social responsibility. Students fatten their ego without doing any hard work, and waste their time on athletics, political organizations, class organizations, dramatic organizations, clubs, societies too numerous to mention, fraternities, and dances. Progressive education is at the core of the trouble with modern education. Stressing natural instincts tends to lead our culture back to the place where these instincts came from, savagery and animalism. The result is that students are not learning how to solve the problems of our economic, political, and social life; the physical and material are exalted; and the things of the spirit and intellect are debased.

The religion of tomorrow will attain the goal of life by building a human society according to the highest moral standards and spiritual ideals; it will teach a monotheistic, infinite, indwelling God. It will emphasize truth more than authority, liberty more than status, and leadership more than control. It will not be propitiatory, sacrificial, or expiatory. It will magnify God's love and compassion; it will not be gloomy, ascetic, or maledictory; it will deal with joy and life more than death and sorrow. It will be in essential agreement with the personal teaching of Jesus, will care little for creeds and doctrines, but much of the love of God and service of mankind. It will teach that God chose all humanity, even if all of humanity has not chosen God.

It will not be characterized by close-mindness and intolerance, and one of its greatest characteristics will be humility. It will be a religion of continual revelation, and will use evangelism to appeal to the emotions and to reason.

Education in the future will (1) pass on the culture of the race, (2) help the young to grow into adult roles, (3) teach manners and morals, and (4) make graduates progressive-minded co-creators of a better society. Education does not necessarily need more money, but it needs to use the facilities now available on a full time basis rather than a part time basis. Young men and women should not go to college for a vacation, to frolic, or to get student offices, or for extra-curricular activities. Students for college should be accepted only on the basis of their intellectual ability. Education should be for education, not show business. Elective systems and snap courses should be eliminated. The curriculum should not be cut up into unrelated parts, and the unity of truth should not be forgotten. In order to orient students to life, there should be four great fields of concentration: (1) Man and the past, by study of history, geology, anthropology, and the ancient and modern literatures; (2) man and nature, the materials for this study being astronomy, biology, physics, chemistry, and psychology; (3) man and his relations to society, the materials for this study being drawn from economics, sociology, geography, politics, government, law, religion, and ethics; (4) man and the world of thought, the materials for this study to be drawn from mathematics, law, philosophy, and the religions of the world. Our institutions must stop running saloons, dance halls, game rooms, athletic carnivals, and other entertainments and time-killing diversions, and concentrate on making their halls of learning work full time. The education of the future should not be characterized by domination of the thinking of the students by the faculty, or domination of the faculty by governing boards on the subjects of education. It should emphasize heredity, continuity, and memory, but will be characterized by open-mindedness, tolerance and the spirit of progress. The ideal of teachers and students will be the discovery of truth. Young men and women will more and more learn how to live in our complex social order.

Two great reforms are needed to make government an effective instrumentality for the creation of the good society: One relates to matters of form within the pattern of political democracy, and the other relates to the substance of the social control it should exercise over its people.

Law, as an instrumentality for the creation of the good society, is necessary until that distant time when external control becomes unnecessary because all, or nearly all, men will want to live according to the highest moral standards and spiritual ideals. Our present system of legal procedure is bad—the worst on earth. The evils the author lays at the door of our system of legal procedure include delay, uncertainty, appeals on points of procedure, reversals for technicalities, perjury and suppression of testimony, good cases lost by poor lawyers, shysterism, expense, and subordination of the end (justice) to the means (procedure). There is no way to cure the evils of our system of procedure and the entire system should be abolished, and a better system adopted.

Time is running out. Humanity is standing on the brink. It cannot wait for the slow processes of evolution. Social sciences and social morals must keep abreast of physical sciences, or humanity will lose what civilization it has already acquired. It is not probable that the good society can be created unless the four great factors for human progress—families, education, government, and religion—are reformed. The human race stands today halfway on the long journey of life from the cell to the Kingdom of Heaven. The Kingdom of Heaven may be as far off in the future as the cell is far back in the past. Most men have travelled only a short distance on the road to the Kingdom of Heaven, up only the gentler slopes of the mountain; others have climbed higher. Only moral power, with Jesus as a guide, will enable them to surmount the ultimate heights and ascend the plains of immortal beauty.

It is probable that most readers (this reviewer included) will find themselves in disagreement with a number of the authors views. He attacks the status quo in such sensitive areas as law, religion, economics, and education. It has always been true that every threat to the existing order is met with resistence; and it is also true that civilization has progressed only as new ideas, usually introduced by leaders in thought, have found acceptance by a considerable number of people. It does not follow that all new ideas, or proposals for change, are good. While the author does not introduce any new idea, some of them are new in the sense that they have not heretofore found acceptance.

The reforms advocated in legal procedure would mean the abandonment of the adversary theory of litigation, a distinguishing characteristic of the common law system. Whatever faults there are in the system, and there are many, most members of the legal profession who have been schooled in the common law system simply do not believe anyone has yet devised a better method of discovering the truth in lawsuits. To do away with trial attorneys and turn over to the State the entire job of administering the laws will find little favor with many who have had experience with federal boards and commissions where the functions of investigation, fact finding, and decision, are combined in the same persons. The time has not yet come when government can be trusted with the entire task of administering the laws.

But the legal profession will do well not to lightly brush aside critics of the system. Instead, the entire profession should get busy about the job of finding and correcting the faults in legal procedure, as many leaders are now doing. Nothing less will save the system in the long pull.

The fact that the author's views are in some respects controversial is no reason why this book should not be read with interest, enlightenment and profit; for we do not read serious books to confirm our beliefs. All truth has not been discovered, and what we hold to be truth must be forever brought into question and be able to hold its own in the competition of the intellectual market. The author is a scholar of high rank, and he thinks on a lofty plane. The honest work of such a man is entitled to compete in the realm of ideas.

Rather than merely deploring the rising incidence of crime, juvenile delinquency, and other evils and follies of our times, the autho recognizes these evidences of moral and spiritual bankruptcy as the results of the failures of our basic institutions—the family, churches government (including its law), and education. The author does no fall into the error of dealing with society's ills in fragments; nor doe he come up with specific and pat answers for specific problems. Instead he sees the social order as a complex, a synthesis of the ideas and functional activities of many factors.

The author succeeds to a high degree in provoking a higher leve of thinking. The good society he envisions may be ever so far away in the distant future, but the present society can be made better as people raise the plane of their thinking to the level of moral principles and spiritual ideals.

Robert G. Gillespie,
Associate Justice, Supreme Court
of Mississippi

THE LIGHTER SIDE OF THE LAW

By John G. May, Jr. Charlottesville, Virginia: The Michie Company, 1956. $5.00

Someone has said that in the breast of every lawyer lies the wreck of a poet. I am inclined to go along with that. But the lawyer's breast is necessarily quite capacious, and I have always felt that considerable of the raconteur must also be there, judging from the outcroppings.

This is a collection of witticisms, jests, and narrations of striking incidents related over the years by lawyers, and compiled and collected by a member of the Virginia Bar. Some are familiar—many hitherto unpublished and unheard by your reader.

They are concerned for the most part with the practice of our profession:

Example:

"A damage suit was being tried in the ______________ Circuit Court of ______________. The attorney for the plaintiff had subpoenaed a prominent physician to testify in the case. When the witness was called, he had not in court and the judge very promptly ordered the court bailiff to go out and bring in the witness.

It was a very stormy, snowy day. After spending some time searching for the missing witness, the court bailiff came back into court puffing and blowing and covered with snow. Removing his hat and shaking the snow from same, the bailiff made the following report:

'The doctor cannot be found because he is on a bad case of obstetrics and I want to tell you, Your Honor, and gentlemen, if this weather continues we will all be down with it.' "

(From West Publishing Company's "Docket.")

Exception:

"Governor Herman Talmadge, Jr., of Georgia met the press upon a visit to Florida. Extolling the virtues of his state, a newsman was prompted to ask what he had to say of so many people in Georgia moving to Florida. 'I am sure it will enhance the intelligence of the people of both states,' replied Talmadge."

Good jokes to be gathered from a good joke book are not many. But this book is one of the better ones, and it would be a welcome addition to the library, and repertoire, of each of you anecdotists.

N. S. Sweat, Jr.
District Attorney,
1st Judicial District
Corinth, Mississippi

LANDMAN'S LEGAL HANDBOOK

**By the Denver Legal Staff of Continental Oil Co., Denver:
The A. B. Hirschfeld Press, 1957. Pp. 194.**

The expressed purpose of this work is to supply the landman witl a handy reference to answer questions frequently arising in his work These questions involve a broad area of the law of titles. They cove the period of time from the execution of the oil, gas, and mineral leas to the completion of title curative work immediately prior to drilling The authors have succeeded in reducing the material to brief and understandable language.

The very nature of the landman's job requires that he work in clos cooperation with the legal department of the company by which he i employed or with a local attorney representing his employer.[1] For thi reason, the *Landman's Legal Handbook* should also of interest to attorneys working in or with the petroleum industry.

The book is divided into five parts, each considering one genera area of activity in which the landman is engaged. Part 1 is entitlec "Instruments Affecting Real Property" and discusses such problems a filling in printed forms and executing, acknowledging, and recordin instruments. Part 2 considers the lease, from whom it should be taken delay rental problems and like questions. In addition, problems relating to Federal and Indian leases are considered. Part 3 discusses publi records with special emphasis on records in federal offices. Part deals with curative work and the various instruments necessary to cur a title. To supplement the discussion of this section, numerous form have been included in the appendix. Part 5 is concerned with the problems of federal units.

In this reviewer's opinion, the authors have provided a practica work for the landman as well as an informative work with many helpful suggestions to the oil and gas lawyer. If the book is open to an criticism, it would seem to be that the discussions are slanted to th problems of the Rocky Mountain area. It also appears to this reviewe that too much space has been given to the problems of federal leasing and operations which are specialized problems of the attorney rathe than the landman. Despite these objections it is submitted this is a needed work and should be read by every layman involved in work o this nature.

Marion Smith
Acting Associate Professor of Law
University of Mississippi School of Law

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[1] The authors have been careful to caution the landman against attempting t work out complicated or peculiar real property questions without the advic of legal counsel. The purpose of this book is to aid the landman in doing the day b day work required of his job, not to make him an attorney.

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FUTURE INTERESTS—THE MISSISSIPPI TWO DONEE STATUTE AND THE COMMON LAW RULE AGAINST PERPETUITIES

Arthur B. Custy† *and Jack W. Brandt*††

The application and purposes of the almost defunct two donee statute, the predecessor of Section 838 of the Mississippi Code, has confounded the courts and lawyers of this State since its inception in 1822.[1] It has been called "odd and confused"[2] by no less an authority than Mr. Gray. Indeed its application has by no means followed a constant pattern since its enactment. This statute has been referred to by the Supreme Court of Mississippi as "our rule against perpetuities."[3] A statement of this nature raises the issues of whether or not the two donee statute abrogated, amended or in any manner affected the common law rule against perpetuities as it presently exists in this country, and, if so, to what extent. Hence, any treatment of the subject of perpetuities in Mississippi must, necessarily, involve a discussion of the two donee statute and the common law rule as they are applied to the cases.

The two donee statute has been criticized by almost everyone who has crossed its path as be-clouding the issues of perpetuities needlessly, since the common law rule is sufficient to prevent the evils for which the doctrine was instituted. But it must be remembered that many difficulties accompany the application of the common law rule as the many volumes devoted to the subject will attest.

During the post-revolutionary period it was thought that the English rules regarding restraints on alienation and related subjects wer unsuited to the spirit of republican institutions. Therefore, man States abolished the fee tail, but continued to permit limitations withi the mechanical limits of the common law rule against perpetuities. It was in an attempt to make these subjects "plain and intelligible"[5] tha the Mississippi Legislature, in 1822, passed an act concerning conveyances which included the predecessor of the two donee statute[6] and the present statute on this subject.[7] It would be an understatement t say that these statutes did not accomplish their purpose. This area o the law has never been firmly settled in Mississippi. The Court ha been content to decide each issue as it was presented and has no answered conclusively many of the questions raised concerning the construction to be placed on the statute. This situation has given rise to conflicting opinions concerning the statute and the common law rule. However, recent decisions have thrown light into several hitherto unexplored areas, and it is believed that some guiding principles may be gleaned from an examination of the cases. It is believed that these recent cases as compared to other decisions lead one to the conclusion that the statutory rule and the common law rule against perpetuities exist side by side in Mississippi today. That is to say, a conveyance or devise must not conflict with either rule.

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[1] "Every estate in lands or slaves, which now is or shall hereafter be created an estate in fee-tail, shall be an estate in fee simple; and the same shall be discharged of the conditions annexed thereto by the common law, restraining alienations before the donee shall have issue, so that the donee, or person in whom the conditional fee is vested, or shall vest, shall have the same power over the said estates, as if they were pure and absolute fees; Provided, That any person may make a conveyance or devise of lands to a succession of donees then living, and the heir or heirs of the body of the remainder-man, and in default thereof, to the right heirs of the donor in fee simple." Miss. Code Rev. ch. 42, Art. 1 (24) (1848).

[2] Gray, The Rule Againt Perpetuities, § 746, n. 1 (4th ed. 1942).

[3] Henry v. Henderson, 103 Miss. 48 at 69, 60 So. 33 (1912).

This discussion of the statutory rule will be divided into three parts, since the legislature saw fit to amend the statute on two occasions.[8] Each part will contain a discussion of the cases arising under the particular version of the statute then in force. Lest one is inclined to believe that the two donee statute has lost its vitality since it was amended in 1930,[9] it is well to remember that wills written in the period prior to 1930 are being probated today and are construed under the statute then in force.[10]

1822 - 1857

The statute as it existed during the period from 1822 to 1857 contained no two donee provision, but allowed a conveyance or devise of *lands* to any number of donees, then living, with limitation over to the heirs of the body of the remainder-man, or in default thereof, to the right heirs of the donor in fee simple.[11] Of course it is apparent from

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[4] George's Mississippi Digest, Limitation of Estates, p. 493 (1872).

[5] Ibid.

[6] See note 23 infra.

[7] Miss. Code Ann. § 838 (1942).

[8] The statute was amended to include the two donee provision in 1857. Miss. Code Rev. ch. 36, art. 3 (1857). The statute was again amended in 1930 to exclude the two donee provision. Miss. Code Ann. § 838 (1942).

[9] Miss. Code Ann. § 838 (1942).

[10] Carter v. Sunray Mid-Continent Oil Co., 94 So.2d 624 (Miss. 1957).

[11] See note 1 supra.

reading of the proviso that it does not apply to personal property. t was so held in an early case.[12]

> "By reference to section 24, it will be found, we think, to have little if any bearing upon the question. The object of that section was to abolish entails in both real estate and slaves, whether conveyed by deed or devise; and the proviso contained in the section has exclusive relation to a conveyance or devise of real estate, and cannot, therefore, have any influence upon the construction which must be placed upon a devise or conveyance of slaves."

later case expressly declared that the common law rule was still in efect insofar as personal property was concerned and held the devise in uestion void under that rule.[13]

The first case which contained an informative interpretation of he proviso is the leading case of *Jordan v. Roach*.[14] The devise was o testator's daughter and her heirs forever, but should she die without ssue, or if her child or children surviving her should die before arrivng at the age of twenty-one, then the estate shall revert to testator's ther children and their heirs. The other children of testator now laim under the limitation over—the devisee having died with issue vho survived her only a few weeks. The Court held that the devisee ook a fee simple determinable, and that the limitation over was an xecutory devise. The Court then proceeded to determine whether or ot the executory devise was valid under the common law rule against erpetuities.

> "But in the will before us, the issue of Mrs. Jordan would not take by immediate devise, as purchasers, but by descent, as her heirs; and are not referred to as specified individuals, but as a class or denomination of persons to take in succession, any individual of whom, attaining the age of twenty-one, would be entitled . . . . Assuming then, that according to the true legal construction of the will the issue of the issue, or the grand-children of Mrs. Jordan, were included within the objects of the testator's generosity, the limitation over could not vest, so long as a grandchild or great-grand-child of the first devisee survived. Hence, if she should die leaving issue, and such issue should die under the age of twenty-one years, leaving issue, although the latter might die under that age, the contingency upon which alone the limitation could take effect would not happen within twenty-one years

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[12] Powell v. Brandon, 24 Miss. 343 (1852).
[13] Caldwell v. Willis, 57 Miss. 555 (1880).
[14] 32 Miss. 481 (1856).

> from the death of the first taker. The contingency would, therefore, be too remote, and consequently the limitation over is voi as an executory devise."

Having concluded that the devise was violative of the common la rule, the court turned to the proviso of the statute.

> ". . . the object and effect of the proviso, beyond question, ar not to allow an estate tail to be limited directly to one, or wher there are a succession of donees to the remainderman . . . . Bu the legislature thought, and thought wisely, that the right o alienation might, consistently with sound policy, be suspende for a limited period of time after a person, either by conveyanc or devise, has divested himself of the ownership of his estate. It ha accordingly fixed that limit to a life or lives in being, giving t the donor or devisor the right to limit the ultimate fee to th heirs of the body of the remainderman; and in default of suc heirs, to his own right heirs. Within this limit, the partial interests or particular estates given to the successive donees, ma without doubt, be created by deed, or limited by executory devis Whatever interest the donor or devisor may choose to give t the remainderman, where the estate is conveyed to a successio of donees, with a limitation over to the heirs of his body, it certain that it cannot be an estate of inheritance, as the heirs the body of the remainderman must take, if they take at all, purchasers, and not as heirs . . . . Now, if we test the validity the limitation in question by the provisions of the statute, it seen clearly, that it is not only unauthorized but repugnant to th obvious policy of the law."

Certainly, under its construction of the will, the Court properly hel the limitation over invalid as violative of the common law rule again perpetuities, and also as repugnant to the statute. Judge A. M. Clayto adversely criticizes the Court's construction of the will in an artic in *George's Digest*[15] contending that the authorities do not sustain th view that "children" mean "grandchildren" or issue generally. Bu be that as it may, the Court laid the foundation for interpretation the statute. One can only wonder why the Court thought it necessa to test the devise by the common law rule, since it seems that th Court, as constituted in 1904, was of the opinion that the statu amended the common law.[16] A logical reason for the application the common law rule might well be that the Court thought both rul existed and that the devise must meet the test of each.

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[15] George's Mississippi Digest, Limitation of Estates, p. 499 (1872).
[16] Middlesex Banking Co. v. Field, 84 Miss. 646, 37 So. 139 (1904).

Another landmark case construing the original statute was decided in 1881, long after the two donee provisions had been added.[17] The case concerned a deed conveying realty to trustees in trust for the use of A for life, at his death to all his children who attain the age of 21 or marry; and if A should die leaving no child who should attain majority or marry, then to B for life, at his death to his children who attain the age of twenty-one or marry; and if B should die leaving no child who should attain majority, then to all grandchildren of the grantor. The Court said that the limitation did not offend "the rule against perpetuities, nor against our statutes on that subject." The Court then stated that the common law rule only required that an interest should vest within twenty one years and ten months "after the death of the last survivor of any number of successive donees or devisees, who were in being at the time the conveyance took effect, and such also is the requirement of the statute in force when the deed was made." The Court appears to be saying that the original statute was merely a codification of the common law rule, at least as to the period within which the interest must vest. There has been much conjecture on this point. In a later case, the Court thought the twenty-one year period was not intended to have been read into the statute,[18] but that theory is certainly not supported by the *Cannon* case. Therefore, the only change the statute made in the common law, if the *Cannon* decision is followed, was to limit the class of persons who could take under the ulterior limitation to the heirs of the body of the remainderman, or the right heirs of the donor. The Court also stated the oft repeated proposition that the statute did not give a formula for conveyancing but laid down a limit beyond which a grantor or devisor may not go, and within which he can use unbounded discretion.[19]

In *Gully v. Neville*,[20] a will was held to be totally invalid under the original statute. In the *Jordan* case,[21] where the ulterior limitation was void, the valid portion of the will was allowed to stand. The distinction, however, seems to be proper since in the *Gully* case the intention of the testator would have been defeated had the will been allowed to stand in part. It appears that if the scheme of the testator is not thwarted by the invalid limitation, the valid portion will stand, but if the intention of the testator is destroyed by the avoided portion, the will is wholly invalid. These generalizations have been used and followed throughout the history of the statute.[22]

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[17] Cannon v. Barry, 59 Miss. 289 (1881). The will in this case was executed before the statute was amended in 1857.

[18] See note 16 supra.

[19] Cannon v. Barry, 59 Miss. 289 (1881); Middlesex Banking Co. v. Field, 84 Miss. 646, 37 So. 139 (1904).

[20] 55 So. 289 (Miss. 1912).

[21] It seems that every case decided after the Gully case has allowed the valid portion of the will to stand.

Under the original statute the decisions seem to be easily harmonized, and it appears the Court understood the statute as well at its inception as it ever has. It seems reasonable to assume that if the statute had been left in its original form most of the difficulties would have been resolved finally one way or another. At least the conveyancer or draftsman would have known with some degree of certainty that his writing would withstand the test of the statute. The lawyer could have reasonably assured the testator that he was not creating a "perpetuity." Unfortunately, the difficulties were just beginning.

1857 - 1930

In 1857 the statute was amended to provide "that any person may make a conveyance, or a devise, of lands to a succession of donees then living, *not exceeding two;* and to the heirs of the body of the remainder man; and in default thereof, to the right heirs of the donor in fee-simple."[23] "The restriction of the number of lives which may be counted to two was an ill-considered innovation introduced by New York in 1830 . . . ,"[24] and was followed by a few other states. It is probable that this was the source from which the amendment came. Criticism of the amendment would serve no useful purpose since that has been adequately accomplished by various writers.[25] It is evident that the criticism was well taken since the two donee provision was struck from the statute in 1930.

The first decision[26] rendered under the two donee provision concerned the following devise: To A for life, then to B, but if B die without issue or during minority, then to C and the children of D. It was held that the devise did not violate the two donee provision since the limitation over was "dependent upon the expiration of less than three lives in being and upon the dying of the holder of the particular estate without issue living at her death." No mention was made of the contention of counsel in his brief that the property was given to two donees and then limited to persons who were not the heirs of the body of B, or the right heirs of the donor. In *Bibby v. Broome*,[27] a case where the limitation over was to persons not the heirs of the body of the remainderman or the right heirs of the donor, the devise was held to be void, ". . . for they are neither heirs of the body of the remainderman, nor right heirs of the donor consequently the limitation over to them violates Section 2675, Code of 1906." Perhaps the reason no consideration was given this point in the *Busby* case is that it was not raised in the court below. Chief Justice Smith, in the *Bibby* case, announced that it would be presumed that the ulterior limitees were statutory heirs under the two donee statute unless proven otherwise by the party denying the relationship.

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[22] Dulaney, The Two Donee Statute, 1 Miss. L. J. 398 (1929). The writer seems to be of the opinion that the Gully case will no longer be followed.

[23] "Estates in fee-tail are prohibited; and every estate which shall be created an estate in fee-tail, shall be an estate in fee-simple; Provided, that any person may make a conveyance, or a devise, of lands to a succession of donees then living, not exceeding two; and to the heirs of the body of the remainder man; and in default thereof, to the right heirs of the donor in fee-simple." Miss. Code Rev. ch. 36, art. 3 (1857); Miss. Code Rev. § 2286 (1871); Miss. Code Rev. § 1190 (1880); Miss. Code Ann. § 2436 (1892); Miss. Code Ann. § 2675 (1906); Miss. Code Ann. § 2269 (1917).

[24] Lee, The Rule Against Perpetuities in Mississippi, 10 Va. L. Rev. 533 (1924).

[25] Gray, The Rule Against Perpetuities, § 746 n. 1 (4th ed. 1942); Smith, Mississippi's Odd and Confused Statute, 2 Miss. L. J. 228 (1929); Dulaney, The Two Donee Statute, 1 Miss. L. J. 398 (1929).

[26] Busby v. Rhodes, 58 Miss. 237 (1880).

It was during the early part of this period that the struggle began as to the correct construction of wills devising land to testator's children equally, with cross-remainders or executory limitations over to the surviving children when one or more of the children died without issue. This was a time honored method for the testator to provide for his children and grandchildren. But its value as a family dispositive technique was greatly lessened by the two donee proviso, as we shall see. There seem to be three distinct lines of authority on this point: There are cases which hold the limitation over to the survivors as invalid under the statute.[28] The leading case of *Smith v. Muse*[29] is typical. Testator devised to his wife and children equally, and if any one of the said children die leaving no heirs of the body surviving him, or descendants of such heirs, then that portion shall revert and go to the survivors of his children, and his wife equally. The Court held that the first clause devised a fee which was made defeasible in the second clause upon the death of a child without issue. "The donees, it is true, were all in being; that is not the trouble. It is that there were more than two successive donees or classes of donees." The estate limited was capable of being held by each one of the children of the testator in succession; therefore, the limitation was void. In all cases reaching this result, the Court found that the initial gift to the children was a fee simple defeasible upon their death without issue. Therefore, no way could be found to avoid the statute since such a devise is obviously not a gift to the children as a class. However, where the gift is to the testator's children for life, with a limitation over to the surviving children in event of failure of issue, the Court has been ready to mitigate the harshness of the statute by finding the gift to the children to be one to them as a class,[30] thus avoiding the succession of donees exceeding two. The leading case for this proposition is *Redmond v. Redmond,*[31] where testator devised to his seven children for their lives, and upon the death of any child, then to the remaining children, and after the death of the last child to be equally divided among all of the grandchildren. The Court said:

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[27] 116 Miss. 70, 76 So. 835 (1917); Darrow v. Moore, 163 Miss. 705, 142 So. 447 (1932); Morgan v. Morgan, 219 Miss. 480, 69 So.2d 282 (1954).

[28] Hudson v. Gray, 58 Miss. 882 (1881); Nicholson v. Fields, 111 Miss. 638, 71 So. 900 (1916); Smith v. Muse, 134 Miss. 827, 98 So. 436 (1924); Scott v. Turner, 137 Miss. 636, 102 So. 467 (1925); Norfleet v. Norfleet, 151 Miss. 790, 119 So. 306 (1928); Carter v. Sunray Mid-Continent Oil Co., 94 So.2d 624 (Miss. 1957).

[29] 134 Miss. 827, 98 So. 436 (1924).

> "He made one devise to all of his children—one gift to all—to extend as long as the life of the longest liver . . . . There is not a succession of donees in the devise to his seven children . . . . The estate in the property disposed of is a life estate. The term of this life estate is the length of the life of the longest liver . . . and then at the end, when all of his children shall have died, the property goes to his grandchildren, his right heirs, in fee simple."

The doctrine of "class gifts" as it was first used seems to be a valid exception to the rule of *Smith v. Muse,* but the Court came to look upon it as a convenient escape hatch in almost any situation. In almost every case which devised a life estate to the children of the testator, the Court held it to be a gift to a class.[32] Judge Griffith, in a later case,[33] attempted "an approximation" of the definition of a class.

> "When there is a gift or grant to a number of persons, although one or all of them may be named, if the naming of them was intended merely as a matter of identification, and these persons are united or connected by some common tie, and it is clear that the donor was looking to the body as a whole or as a group, rather than to the members constituting the body as individuals, and that he intended that the group might fluctuate in numbers, so that, to preserve the group, if one or more of that body died during the period in question, the survivors should take the gift between them, either in equal or in some other naturally related portions, the gift is to be construed as one given to them as a class."

The third avenue which has been used by the Court to sustain gifts of the type under discussion appears in *Bullard v. Bullard.*[34] There the testatrix devised to her children for their lives, and after their death to their children then living, but should any of testatrix's children die without issue, his share shall go to the surviving children. It was reasoned that, "It is perfectly manifest . . . that it was the intention of the testatrix that the child or children of each life tenant should take the remainder in fee after the life estate of the deceased parent . . . . *We think it was her intention that a remainder in fee in the share of any one of her children who should die without issue should vest in the surviving children of the testatrix . . . .*" [emphasis ours] This approach gives to each of the testatrix's children a life estate in an undivided interest in testatrix's estate with a contingent remainder in fee to the issue of the children in their parents' share followed by a contingent remainder in fee in the testatrix's surviving children. This then, in effect, gives each child a life estate followed by a remainder. The statute obviously would not apply since the two donee provision is not violated. Using this theory, the Court could sustain almost any devise or conveyance, and certainly the cases following *Smith v. Muse.*

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[30] Henry v. Henderson, 103 Miss. 48, 60 So. 33 (1912); Redmond v. Redmond, 104 Miss. 512, 61 So. 552 (1913); Shannon v. Riley, 153 Miss. 815, 121 So. 808 (1929); Morgan v. Morgan, 219 Miss. 480, 69 So.2d 232 (1954).

[31] 104 Miss. 512, 61 So. 552 (1913).

[32] See note 25 supra. But see Bullard v. Bullard, 132 Miss. 544, 97 So. 1 (1923), reaching the same result in a somewhat different manner.

[33] Shannon v. Riley, 153 Miss. 815, 121 So. 808 (1929).

[34] 132 Miss. 544, 97 So. 1 (1923). Compare Armstrong v. Thomas, 112 Miss. 272, 72 So. 1006 (1916).

The recent case of *Carter v. Sunray Mid-Continent Oil Co.*[35] appears to have settled these issues in a rather convincing manner. The pertinent part of the will executed in 1899 was to A, B, and C (children) in common, but if any child die without bodily heirs living at death, then to the survivors; but if bodily heirs survive, then to them by representation. The Court in an excellent opinion rejected the contention that the devise created a gift to the children for the life of the longest liver. In refusing to torture the language of the will and call the devise a class gift, the Court distinguished the *Shannon* case saying it was "an exception to the general rule as to what constitutes a class gift."[36] The Court followed *Smith v. Muse* and held that the devise was violative of the two donee statute. It is evident that the Court, as presently constituted, applies a strict rule in regard to class gifts and will not strain the words of a deed or will in order to bring the gift within the class gift shelter. The theory of *Smith v. Muse* has triumphed, at least by implication, over the somewhat dubious authority of *Bullard v. Bullard.*

In the *Bullard* case the Court announced the rule that it is the duty of the Court to so construe the will, if possible, as to make the instrument valid, and in other cases[37] cites Mr. Gray for the proposition that the statute is not a rule of construction, but a peremptory command of law, the object of which is not to determine intention but to defeat intention.[38] If these two rules are taken together, it appears that the Court will construe a will in the manner most favorable to its validity, and will then apply the peremptory command of law remorselessly.[39] However, the rule of construction outlined in the *Bullard* case would probably not be followed today.[40] Furthermore, the Court has held that it will not consider the ulterior limitations of a will if no question as to their validity is presented by the facts of the case.[41]

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[35] 94 So.2d 624 (Miss. 1957).

[36] Citing Byrd v. Wallis, 182 Miss. 499, 181 So. 727 (1938); Lee v. Foley, 224 Miss. 684, 80 So.2d 765 (1955).

[37] Henry v. Henderson, 103 Miss. 48, 60 So. 33 (1912); Lazard v. Hiller, 145 Miss. 449, 110 So. 855 (1927); Bratton v. Graham, 146 Miss. 246, 111 So. 353 (1927).

[38] Gray, The Rule Aginst Perpetuities, § 423 (3rd ed. 1912).

> "It is not necessary to consider all of the provisions of the will and to say whether under any of the contingencies therein mentioned the second part of this statute is violated. These questions cannot be considered until these contingencies arise and a proper case is then presented to the court for decision."[42]

During the period from 1857 to 1930 it became firmly settled that the twenty-one year and ten month period in gross, found in the common law rule, is also present under the two donee statute. The Court in *Middlesex Banking Co. v. Field,*[43] refused to overrule the prior cases on this point.[44]

> "It may further be conceded that it would have been wiser if this court had originally construed this statute, as intended, as a substitute for all common law rules to which its provisions can apply, instead of as merely amendatory of the common law; but for us it must be enough that the long line of contrary decisions has become crystalized into a rule of property."

The Court went on to indicate that it was reasonable to suppose no such period was intended by the statute, "since it fixes by its own terms the time limit within which the ultimate fee must vest . . . . But whilst that might have been the better holding originally, the direct contrary has been held in *Cannon v. Barry* . . . ."

One of the most anomolous decisions rendered construing the statute was that of *Thomas v. Thomas*.[45] The Court refused to decide whether realty or personalty was devised, but held that it made no difference since the devise violated neither the common law rule nor the statute. It was then stated that the statute had no application since the limitation involved an executory devise. The contention that the statute does not apply to executory devises was flatly rejected by Chief Justice Smith, on suggestion of error in *Bibby v. Broome*.[46] Judge Smith stated that the Thomas case was in conflict with the many prior cases[47] applying the statute to executory devises, and that the limitation in the *Thomas* case was a contingent remainder, not an executory devise.

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[39] "Therefore every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be remorselessly applied." Lazard v. Hiller, 145 Miss. 449, 110 So. 855 (1927).

[40] The problem was discussed generally in Carter v. Sunray Mid-Continent Oil Co., supra note 10, where the Court did not think such a liberal construction proper.

[41] Stigler v. Shurlds, 131 Miss. 648, 95 So. 635 (1923).

[42] In Carter v. Sunray Mid-Continent Oil Co., supra note 10, the Court felt the rule just announced of little merit, "although it is to be conceded that some of the language used in that case . . . as to contingencies provided for and which did not happen, has given us a good deal of concern on the question of whether or not the will now under consideration should be adjudged as of the date when it became effective, and looking forward to the contingencies that could have arisen instead of backward to determine whether or not it violates the two-donee statute in the light of what has actually happened."

[43] 84 Miss. 646, 37 So. 139 (1904).

[44] Jordan v. Roach, 32 Miss. 481 (1856); Cannon v. Barry, 59 Miss. 289 (1881). See the later case of Lazard v. Hiller, 145 Miss. 449, 110 So. 855 (1927).

The statute does not indicate what the effect of a void gift does to the valid portion of the instrument. Generally, the Court has construed the statute as intending the same result as in the case of a fee tail, and has usually held that the donee prior to the void limitation takes a fee simple,[48] thereby enlarging the estate devised by the instrument.

It is apparent from a review of the cases that the Court was not certain in regard to the question of whether the two donee statute was a substitute for, or merely an amendment to, the common law rule against perpetuities. The cases under the original statute, discussed in the preceding section of this article, give one the impression that the Court thought the statute was a codification of the common law;[49] but when the two donee provision was inserted it was evident that such a proposition could no longer be sustained. Many decisions indicate that the Court thought the statute now amendatory of the common law—by limiting the number of lives in being to two.[50] During this period the Court called the statute the "rule against perpetuities,"[51] "our statute against perpetuities"[52] and "the statute of this State against perpetuities."[53] Some cases have briefly discussed the issue. In *Bibby v. Broome*[54] the Court said: "Whether this clause of that section was intended as a substitute for, or as only an amendment to, the common law rules with which it deals is not here material, for in either case, it must, of course, control wherever its provisions are applicable."[55] Other cases have taken a seemingly different view and leave the impression that both the statutory rule and the common law rule are presently in force.[56] In *Shannon v. Riley*,[57] the Court said: "The instrument is attacked from numerous points of assault as being, not in contravention of our common law rule against perpetuities, but in violation of our two-donee statute . . . ." On the other hand, in *Nichols v. Day*,[58] the Court discussed only the common law rule—since the two donee statute obviously had no application to the timber deed with right of perpetual renewal in question. Following the same vein of thought in the latest case construing the two donee statute, the Court refused to confuse the two rules stating: "There is enough apparent confusion in our own cases, without confusing the provisions of the two donee statute with the common law rule against perpetuities . . . ."[59] In that case the devise in question was clearly within the contemplation of the statute and no question of the common law rule had been presented in the lower court or on appeal. If any rule was stated in this decision it seems to be that when a case concerns a succession of donees and no question is raised as to the common law rule against perpetuities, then there is no need to consider the common law and only the statute will be applied. It is also implicit in this reasoning that where a case concerning the common law is presented, the Court will apply the common law rule as in the *Nichols* case.

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[45] 97 Miss. 697, 53 So. 630 (1910).

[46] 116 Miss. 70, 76 So. 835 (1917).

[47] Jordan v. Roach, 32 Miss. 481 (1856); Hudson v. Gray, 58 Miss. 882 (1881); Henry v. Henderson, 103 Miss. 48, 60 So. 33 (1912).

[48] In Davenport v. Collins, 95 Miss. 358, 48 So. 733 (1909), a life estate was enlarged into a fee simple. Many cases enlarged a fee simple determinable into a fee simple absolute. Smith v. Muse, 134 Miss. 827, 98 So. 436 (1924); Scott v. Turner, 137 Miss. 636, 102 So. 467 (1925); Carter v. Sunray Mid-Continent Oil Co., 94 So.2d 624 (Miss. 1957). However, the limitation of this rule found in Gully v. Neville, supra at note 15, must be noted.

[49] Cannon v. Barry, 59 Miss. 289 (1881).

[50] Henry v. Henderson, 103 Miss. 48, 60 So. 33 (1912); Redmond v. Redmond, 104 Miss. 512, 61 So. 552 (1913); Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922); Russell v. Federal Land Bank, 180 Miss. 55, 176 So. 737 (1937).

[51] Beeks v. Rye, 77 Miss. 358, 27 So. 635 (1899); Nicholson v. Fields, 111 Miss. 638, 71 So. 900 (1916).

[52] Phillips v. Tynes, 114 Miss. 775, 75 So. 775 (1917).

[53] Redmond v. Redmond, 104 Miss. 512, 61 So. 552 (1913).

[54] 116 Miss. 70, 76 So. 835 (1917).

Evidently, the attitude of the Court changed during the later years of this period to the realization that all perpetuity problems could not be resolved by the two donee statute, and that in appropriate cases the common law rule still exists.

1930 - PRESENT

In 1930 the statute was amended to read as does the present section 838.[60] The two donee provision was omitted and a conveyance or devise of lands may be made to succession of donees then living, and upon the death of the last donee, to any person or any heir. Apparently, the present statute is similar to the original statute except for the restriction in the old statute that the limitation over must be to the heirs of the body of the remainderman or the right heirs of the donor. No decision has as yet expressly construed the present statute. Hence, any discussion of its meaning and effect is mostly conjecture. However, there is some basis for discussion to be found in the cases construing the original statute and in the opinions of various writers.

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[55] See also Middlesex Banking Co. v. Field, 84 Miss. 646, 37 So. 139 (1904).

[56] Bratton v. Graham, 146 Miss. 246, 111 So. 353 (1927), ". . . would not violate the rule against perpetuities or the two donee statute." Hanie v. Grissom, 178 Miss. 108, 172 So. 500 (1937).

[57] 153 Miss. 815, 121 So. 808 (1929).

[58] 128 Miss. 756, 91 So. 451 (1922).

[59] Carter v. Sunray Mid-Continent Oil Co., supra note 10.

[60] "Estates in fee tail are prohibited, and every estate which, but for this statute, would be an estate in fee tail, shall be an estate in fee simple; but any person may make a conveyance or a devise of lands to a succession of donees then living, and upon the death of the last of said successors to any person or any heir." Miss. Code Ann. § 838 (1942).

The works of the leading text-writers offer little of value on this point. Gray only ventures that "It appears that the common law rule against perpetuities has always remained in force in Mississippi, as modified by statute."[61] Other writers are of the opinion that the statute modifies the common law rule in some manner, but decline to be specific.[62] A more informative opinion was given in an article appearing shortly after the statute was amended in 1930[63] which stated that "the only change made by the new statute of the common law rule is the elimination from that rule of the twenty-one year period after the death of some person living when the conveyance or devise is made." This is perhaps the most reasonable view from a literal reading of the statute. But, the argument overlooks the prior decisions of the Court which hold that the twenty-one year period was implicit in the statute.[64] Further, it must be remembered that for the purposes of determining whether the period in gross is to be construed as present, no material change has been made in the statute. One cannot deny that such a judicial interpretation may appear to strain the plain words of the statute. However, the revisor is presumed to know the content of the prior decisions of the Court on this point and evidently did not see fit expressly to exclude the period in gross from the present statute. Therefore, if prior judicial construction and precedent are to control, the present statute is a substantial re-enactment of the common law rule against perpetuities. But even if this be true, does it dispose of all perpetuity problems? The answer must be that it does not, for several recent cases have applied the common law rule to the exclusion of the statute.[65] In a 1941 case[66] concerning an oil and gas lease with a perpetual renewal clause, the Court stated that the lease did not violate the common law rule because the interest was a present vested interest, and that the present section 838 was not applicable to such a case since it did not concern a succession of donees. However, a leading case in Mississippi for the proposition that the common law rule is in force is *McCormack v. Blanks,*[67] which was decided without reference to the statute. The testator devised his real and personal property to his wife so long as she remained his widow, and thirty years after the death of the testator the title of all the property was to vest in such of his children or their descendants as did not convey or attempt to convey their interest in the estate. The Court held that the devise was violative of the common law rule against perpetuities and against alienation, quoting the general rule from *American Jurisprudence* that no interest subject to a condition precedent is good unless such condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.[68] Obviously, the devise violates the common law rule since no lives in being were suggested and the interest would not vest until a period greater than the allowable twenty-one years.[69] Although the statute was not relied upon in determining the validity of the devise, cases construing the statute were cited as precedent to determine the effect of the void limitation upon the remaining portion of the will.[70] Under the decisions since 1930 it can safely be said that both the statutory rule and the common law rule against perpetuities are present, and it can no longer be considered that the present statute is a complete substitute for the common law in regard to perpetuities.

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[61] Gray, The Rule Against Perpetuities, § 746 n. 1 (4th ed. 1942).

[62] Simes & Smith, The Law of Future Interests, § 1437 (2nd ed. 1956); 6 Am. Law of Real Property § 25.89 (1952); Rubenstein, Perpetuities, ch. III, p. 34 (1959).

[63] Holmes, Some Observations on the Statutory Rule Against Perpetuities, 4 Miss. L. J. 122 (1931).

[64] See note 44 supra.

[65] Greenwood I.O.O.F. v. Hyman, 180 Miss. 198, 117 So. 43 (1937); Jones v. Burns, 231 Miss. 833, 74 So.2d 866 (1954).

[66] Lloyd's Estate v. Mullen Tractor & Equipment Co., 192 Miss. 62, 4 So.2d 282 (1941).

CONCLUSION

While it is difficult, if not impossible to state any definite or hard and fast rules which will apply to every case arising under the two-donee statute or the statute as amended in 1930, in recent cases the Court has indicated its views on the subject. The present Court, when applying the statute, will not search for a "class gift" or other method to avoid the effect of the statute which will torture the plain words of the instrument. This is not to say that a will construed under the two donee provision which devises a proper class gift under the doctrine of the *Redmond*[71] case will be invalidated, but that the devise or conveyance will be given its natural meaning and will be construed in accordance with the rule that the statute is not a rule of construction but a peremptory command of law. Further, it seems the statute will be applied to all cases where there is a succession of donees, to the exclusion of the common law. Conversely, where the instrument devises or conveys in any manner other than to a succession of donees, it appears the common law rule against perpetuities is in force and will be applied as in the *McCormack*[72] case. If this is a valid conclusion based upon the decision, a devise or conveyance of lands must stand the test of both the statutory rule and the common law rule against perpetuities in appropriate situations. Thus A devises land to B twenty-five years after the death of A. It would appear that in such an event the statutory rule would be inapplicable, and the common law rule would apply. On the other hand where A devises land to B, C, and D for their lives and then ten years after the death of the longest liver to E, then the statutory rule would be applicable. In this latter situation if the present statute is literally construed, then the gift to E would be void since it does not take effect until ten years after the death of the longest liver or "succession of donees." However if the Court should conclude that the present statute includes the period in gross by implication and precedent, then the gift to E would be good since it would vest at a time well within twenty-one years after the death of the longest liver.

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[67] 226 Miss. 767, 85 So.2d 204 (1956); Note, 28 Miss. L. J. 88 (1956).

[68] 41 Am. Jur., Perpetuities and Restraints on Alienation § 3 (1939).

[69] Simes, Future Interests, § 1225 (2nd ed. 1956).

[70] Thomas v. Thomas, 97 Miss. 697, 53 So. 630 (1910); Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922).

[71] See note 31 supra.

It appears that Mississippi has a statutory rule against perpetuities which is embodied in Section 838 of the Code. This rule is applicable where there has been a conveyance or devise of land to a succession of donees then living, and upon the death of the last of said successors to any person or any heir. It should be applied only in appropriate situations. But it must be remembered that the Mississippi Supreme Court has not, as yet, construed the statute as presently written, but the Court has available to it substantial precedent arising under the original enactment in 1822.

It seems to be equally true that there is also in force in Mississippi the common law rule against perpetuities. The common law rule is applicable in those situations which are not within the present statute. The common law rule should be applied only in appropriate situations not covered by the statute.

It appears that the two donee statute will control all cases arising within its frame of reference when the Court must construe instruments drawn while the statute was in force. The result in cases arising under the two donee statute may be predicted only insofar as the factual picture is analogous to the general decisions discussed earlier in the article.

As a matter of judicial policy the Court should not be required or prevailed upon to engage in judicial legislation by reading the common law rule against perpetuities into the present statute. Indeed to do so would more than "torture" the words of the statute.

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[72] See note 67 supra.

As a matter of legislative policy and consistent with the present expressed State objective of attracting capital and industry to Mississippi as well as permitting its citizens to enjoy greater control over their real property, the Legislature should amend Section 838 by deleting that portion in controversy. This in effect would leave the common law rule against perpetuities alone in force in Mississippi.

INTERSTATE CRIMINAL EXTRADITIONS

*G. Garland Lyell, Jr.**

The need for a procedure for extradition between the states of persons charged with crime was recognized in the Constitution of the United States even when the ramifications and complexities of criminal organizations as they exist today were unknown. The Constitution, Section 2 of Article IV, provides that "a person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on the demand of the executive authority of the State from which he fled be delivered up to be removed to the State having jurisdiction of the crime." The quoted provision is not self-executing and, in fact, left much to be worked out by legislation. This was accomplished partly by federal statutes[1] and in part by state statutes.[2] The Federal Constitution and statutes are controlling, thus state statutes are uniformly held to be valid so long as they are in aid of and not in conflict with the former. In state legislation there has been considerable lack of uniformity throughout the years, and, hence, great opportunity for confusion in administration. Much of this confusion has been eliminated in recent years by the adoption, in whole, or in substantial part, of the *Uniform Criminal Extradition Act*[3] which over forty of the fifty states of the union have adopted. Mississippi has not seen fit to adopt this act, though the adoption has been considered in the past by our state legislature. However, since the great majority of the states operate under the uniform act, we in Mississippi, who are confronted with the extradition of fugitives in other states, must, of necessity, become familiar with its provisions.

While there is no great mystery or difficulty in resolving the many questions that arise in extradition matters, most prosecuting attorneys throughout the state, particularly those new in office, have had little, if any, experience in the preparation of the necessary documents to institute such a procedure. Hence, rather than present a legal dissertation on the many questions involved, this article is intended more as a practical guide to the County Attorneys and District Attorneys and to those in private practice who find themselves representing an alleged fugitive from justice. The several states have various requirements which must be met, and it is believed that if the procedures outlined herein are followed, applications originating in Mississippi will be readily accepted by the authorities of the other states.

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[1] 18 U.S.C.A. § 3181 et seq. (1948).

[2] Miss. Code Ann. §§ 3981-3984 (1942).

[3] See Appendix "D".

THE ESSENTIAL INSTRUMENTS

A. AFTER INDICTMENT

In those cases where the alleged fugitive has already been indicted, the prosecuting attorney should prepare an *Application For Requisition* addressed to the Governor of Mississippi requesting that he, in turn, make requisition upon the governor of the asylum state. The office of the Attorney General maintains a supply of printed forms which may be obtained at any time. A sample with blanks filled in is attached as Appendix "A" hereto.[4] This application is executed by the prosecuting attorney (not by a sheriff or other officer) *in triplicate,* and to each executed copy should be attached a copy of the Indictment and the Capias issued thereon—both of which are certified by the clerk of the court with his usual form of certificate to the effect that they are true and correct copies of the originals on file in his office. After certification by the clerk, they should be further authenticated by execution, by the circuit judge and the clerk, of the *Judge's And Clerk's Certificate* shown as "Appendix B"[5]—a supply of which is also maintained in the office of the Attorney General.

These instruments are the only ones absolutely necessary for preparation by the prosecuting attorney, but, under the practice of some states, it is desirable for the prosecuting attorney to give a statement of facts upon which the charge is based and also to attach copies of the statute or statutes under which the indictment was brought.

B. ON AFFIDAVIT BEFORE A JUSTICE OF THE PEACE

It is not necessary to first procure an indictment. If extradition is sought after affidavit has been made against the alleged fugitive before a Justice of the Peace, it is sufficient to attach to each copy of the Application For Requisition, in triplicate, copies of the affidavit and warrant issued thereon certified by the Justice of the Peace. In this case there should be a certificate from the circuit clerk to the effect that such Justice of the Peace is the duly elected, qualified and acting Justice of the Peace in the particular district and county, and that, as such, he is a committing magistrate. This should be followed by the Judge's And Clerk's Certificate executed by the circuit clerk and the circuit judge.

Insofar as the instruments themselves are concerned, when the county or district attorney has submitted the above instruments with his Application For Requisition to the governor, he is finished with the mechanical aspects of the extradition. They are then approved by the Attorney General as to form and content and transmitted to the

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[4] See Appendix A.
[5] See Appendix B.

Governor with an approving letter. When received by the governor, he makes the formal demand upon the governor of the asylum state and also prepares an instrument designating the person named in the application as the agent for the State of Mississippi to go to the asylum state, take custody of, and return the fugitive when the extradition has been granted.

NON-SUPPORT CASES

A large percentage of the extradition matters, both outgoing and incoming, are cases in which fathers are charged with abandonment or desertion of minor children and with leaving them in destitute and necessitous circumstances. Practically every state has a statute similar to Section 2087 of Miss. Code Ann. (1942), which makes this a crime. Under Section 5 of the *Uniform Enforcement of Support of Dependents Act,*[6] extradition may be had for any person charged with the crime of failing to provide for the support of dependents in this state. This uniform act has been adopted by all of the states and territories of the United States. However, though there is no question that a person charged with child desertion can be extradited under these statutes, the governors of many of the states have adopted rules with respect thereto. Governor J. P. Coleman, incumbent Governor of Mississippi, has followed the principles of these rules which are generally in substance as follows:

Before the Governor will honor an extradition request in a non-support case, the application for requisition must be accompanied by a sworn statement from the prosecuting attorney as to one or more of the following:

(1) The civil remedy under the Uniform Enforcement of Support of Dependents Act has been first attempted, or

(2) The accused may be afforded an option to submit to the jurisdiction of a Chancery Court in Mississippi for entry of an appropriate order of support under said act, or

(3) That the accused has hitherto flagrantly violated an enforceable order of support entered in Chancery Court in Mississippi.

The reason for the adoption of the above rules and similar rules by other governors is obvious. Frequently in such cases the criminal processes are being resorted to with no idea of prosecution, but are used merely to return the defaulting person to another jurisdiction for the purpose of collecting money; and in most cases where the defaulter is willing to submit to an order under the uniform act in the asylum state, it would serve absolutely no purpose to return him to the demanding state. Furthermore, the purpose of the Uniform Support Act would be defeated in many cases where the defaulter is gainfully employed in the asylum state and would have no income should he be extradited. Therefore, if extraditions are sought in this type of case, it should be made plain that the extradition is sought for criminal prosecution after a fruitless resort to the civil processes.

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[6] Miss. Code Ann. §§ 456-1 through 456-34 (1942).

UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHIN OR WITHOUT A STATE IN CRIMINAL PROCEEDINGS

Practically all of the states and territories have adopted acts similar to that found in Sections 1892 through 1897 of Miss. Code Ann. (1942), enacted as Chapter 261 of the Laws of Mississippi of 1938. This act sets out a procedure not often resorted to but of great value in procuring the attendance of witnesses in criminal prosecutions where the witness is beyond the jurisdiction of the State of Mississippi. The procedure is a relatively simple one as set out in the statute, and on March 2, 1959 the constitutionality thereof was established by the United States Supreme Court in a case that was appealed from the Supreme Court of Florida.[7]

EXPENSES

Some states make a charge for processing extradition papers, some make no charge, and some operate on a reciprocal basis. Frequently the states making the charge will hold up action pending receipt of this fee. Appendix "C"[8] is a compilation recently made by the Secretary of State of New Mexico showing what fees are charged by the several states. To facilitate prompt handling, it is suggested that a check accompany the Application For Requisition if Appendix "C" indicates the asylum state charges such a fee.

The question frequently arises as to the authority of a county to pay the expenses of the agent and other persons who must necessarily travel to an asylum state to return a fugitive being extradited. This is of particular concern when extradition is resisted in the asylum state and a hearing is held by the governor of that state. While normally the attorney general will represent the demanding state as a matter of comity, at times the prosecuting attorney is called upon to appear either alone or with witnesses in aid of extradition. Witnesses are seldom necessary except where the alleged fugitive denies his presence in the demanding state at the time of the crime with which he is charged. Sections 3964 and 3965 of our Code provide for payment of expenses of those persons who must necessarily travel in connection with the return of such fugitives.

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[7] People v. O'Neill, 79 U.S. 19 (1958).

[8] See Appendix C.

In this connection, before incurring travel expenses it is well to keep in mind that, under the practice prevailing in practically all of the states, the agent of the demanding state should not go after the fugitive until he has been notified by the authorities of the asylum state when and where the fugitive may be taken into custody by the agent. Unless directed to do so by the authorities of the asylum state, it is not a good policy to travel thereto with papers in hand. Frequently an agent does this only to find that a hearing has been asked for, or that there is some procedural requirement which has not been met, and he returns empty-handed. In practice, the governor of the demanding state requests the authorities of the asylum state to notify the agent of the demanding state when and where the fugitive may be taken into custody for return.

In this respect, while the governor and the attorney general have their duties in connection with these matters, neither has a fund from which such expenses can be paid, and it is the duty of the prosecuting attorney to follow up the matters involved after the governor has made his demand upon the asylum state.

ARREST BEFORE EXTRADITION

Except in rare cases, the governors of the states will not honor an an extradition unless the person sought is in custody. To do otherwise would give the agent of the demanding state a warrant to rove the asylum state in search of the fugitive, and most governors are reluctant to do this. The general rule in all states is that asserted in *Loper v. Dees*[9] to the effect that a person charged with a felony or other crime in one state, who has fled to another state, may, before demand for his extradition is made, be arrested in the state in which he is found and detained in custody a reasonable time—in order to give the executive of the state from which he has fled opportunity to issue a Requisition For Extradition. A telegram, letter or telephone call is usually sufficient authority for the arrest of the fugitive in the asylum state. As to what constitutes a reasonable time during which a fugitive may be held, the uniform act sets out a thirty day period, after which the fugitive will be released unless an extension of time is granted by the court of the asylum state. In any event, whether the particular state has adopted the uniform act or not, it is wise to prepare and forward the papers immediately upon the location and arrest of the fugitive.

DEFENSES IN EXTRADITION

There are two methods by which sufficiency of the proceedings may be tested in the asylum state. A fugitive may request and obtain a hearing before the governor of that state, or, either with or without having had such a hearing, a habeas corpus proceeding is available to him Hearings held by a governor are usually informal—but with a general adherence to the rules of the evidence. Neither the governor nor a court on habeas corpus should question the authenticity of extradition papers since the authentication by the governor of the demanding state is conclusive.[10] The purpose of authentication of the affidavit or indictment charging a crime is to prevent the governor of the state upon whom the demand is made from being confronted with spurious charges of crime and to advise him of the genuineness of the copy of the indictment or affidavit. The governor of the asylum state must be satisfied, either from an inquiry conducted by him at his option, or on the basis of the prima facie presumption carried by the regularity from justice of the demanding state; that is to say that he was in the demanding State at the time of the commission of the alleged crime and has departed therefrom into the state where he was found.[11] It has been a common practice in this State in crimes where the date thereof is not of essence, to show in the indictment that the alleged crime was committed on the date of the indictment, or "on or before." This practice leads to some difficulty where it is later sought to extradite the accused, since the crime may have been committed several months prior to the date in the indictment, and he sometimes is able to show the authorities of the asylum state that he was not in the demanding state on, or anytime near, the date in the indictment—thereby evading extradition. It is, therefore, suggested that the date in the indictment be accurate, whether of essence or not, if there is any likelihood that extradition must be employed.

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[9] 210 Miss. 402, 49 So.2d 718 (1951).

With respect to the presence of the accused in the demanding state at the time of the commission of the crime, attention is directed to Section 6 of the *Uniform Criminal Extradition Act.* It will be noted that under the uniform act there are certain extraditable offenses which do not necessitate physical presence of the accused in the demanding state. However, in all cases where physical presence is necessary and where the accused was actually physically present in the demanding state, there should be an express sworn statement to that effect by the prosecuting attorney or the prosecuting witness. Mississippi has not adopted a law similar to section 6 of the uniform act but this does not prevent extradition from states which have this provision in their law. It has been held that it is only necessary that the asylum state make such provision in its law.[12]

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[10] Ex parte Riccardi, 68 Ariz. 180, 203 P.2d 627 (1949). See also 18 U.S.C.A. § 3182, n. 77 (1948).

[11] Bishop v. Jones, 207 Miss. 423, 42 So.2d 421 (1949).

[12] Ex parte Morgan, 86 Cal. App. 2d 217, 194 P.2d 800 (1948), *affirmed* 78 F. Supp. 756 (S.D. Cal. 1948), *affirmed* 175 F.2d 404 (9th Cir. 1949), *cert. denied* 338 U.S. 827; Thomas v. O'Brien, 95 A.2d 120 (N.H. 1953).

In reference to action or inaction by the governor of an asylum tate, it is well to note that he cannot be compelled by any agency or ribunal to issue a warrant of extradition even though the act may nake it his duty to do so under particular circumstances.[13] However, in he interest of the orderly administration of justice and comity between tates, most governors will promptly extradite, if: (1) the demand has een made in proper form; (2) identity has been established; (3) the erson sought is a fugitive from justice or, in states which have adopted he uniform act, he has committed an act which intentionally resulted n a crime in the demanding state; and, (4) he has been charged with substantial crime. These are the considerations to which a governor hould limit himself. Likewise, a court on habeas corpus should be so imited.

CONCLUSION

Because of the fact that the uniform act is more complete than ur own laws on the subject and has been adopted by practically every urisdiction with which we must deal, if the act is complied with there vill be no difficulty in the preparation and handling of extraditions. A ecommended addition to the library of those interested in these mat- ers is the *Handbook on Interstate Crime Control,* published by the ouncil of State Governments, 1313 East Sixtieth Street, Chicago 37, llinois, which contains the several uniform acts, together with anno- ated discussion of the practices thereunder.

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[13] 2 Miss. L. J. 240.

APPENDIX A

APPLICATION FOR REQUISITION

TO HIS EXCELLENCY,

Peter Poe, Governor of the State of Mississippi:

Your petitioner, John Johnson, (District Attorney), for the County of Suffolk, State of Mississippi, would represent unto your Excellency that Joe Doe stands charged by the accompanying certified copy of Indictment with the crime of Mayhem committed in the County of Suffolk, State of Mississippi, on or about the 13th day of March, 19...... .

That on or about the 14th day of March, 19......., after the commission of said crime, the said John Doe fled from the State of Mississippi, and is now, as your petitioner verily believes, in the County of Woonhagen, State of Arizona, a fugitive from justice of this state, and the grounds of such belief are as follows:

> Telegram from Sheriff of Woonhagen advising subject in his custody.

Wherefore, your petitioner prays that a requisition may issue upon the Governor of the said State of Arizona, and that Richard Roe of the City of Billings, County of Kings, State of Mississippi, may be appointed messenger of the State of Mississippi to go after, receive, and return the said fugitive to the County of Suffolk, State of Mississippi, for trial.

Your petitioner further certifies that a requisition of the above-named fugitive is not sought for the purpose of collecting a debt, to allow any person to travel at the expense of the State, or to answer any private end whatever, and shall not be used for any of said objects, and further certifies that in his opinion the ends of public justice require that the said John Doe be brought to this state for trial at public expense, and that he believes there is sufficient evidence to secure his or her conviction.

/s/ John Johnson
District Attorney (Title)

Subscribed and sworn to before me, this 13th day of April, 19........
(SEAL)

/s/ Laverna Smith
Circuit Clerk

(This petition and all other papers presented in connection with an application for requisition must be in triplicate. The petition must, in all cases, be accompanied by a certified copy of the indictment found against the fugitive, or, in the absence of an indictment, a certified copy of an affidavit made before and on file in the office of a Magistrate charging the fugitive with a crime. Certified copies of the capias, or warrant, for the arrest of the fugitive should also accompany the papers.)

APPENDIX B

JUDGE'S AND CLERK'S CERTIFICATE.

STATE OF MISSISSIPPI
COUNTY OF SUFFOLK

I, J. Jones, Judge of the Circuit Court of Suffolk County, said State, do hereby certify that Laverna Smith, whose name is subscribed to the above and foregoing certificate of attestation, now is, and was at the time of signing and sealing the same, the Clerk of the Circuit Court of Suffolk County, and keeper of the records and seal thereof, duly elected and qualified to office; that full faith and credit are, and of right ought to be, attached to all his official acts, as such, in all courts of record and elsewhere, and further that his said attestation is in due form of law, and by the proper officer.

Given under my hand, this 13th day of April, 19........

/s/ J. Jones
Judge of Circuit Court of Suffolk County, Mississippi, Thirty-Second Judicial District Thereof.

STATE OF MISSISSIPPI
COUNTY OF SUFFOLK

I, Laverna Smith, Clerk of the Circuit Court of Suffolk County, do hereby certify that J. Jones, whose name is subscribed to the foregoing certificate of attestation now is, and was, at the time of signing the same, Judge of said Circuit Court, and was duly elected, commissioned, and qualified to office; that full faith and credit are, and of right ought to be, given to all his official acts as such, in all courts of record and elsewhere, and that his attestation is in due form of law, and by the proper officer.

Given under my hand the seal of said court, at Jackson in said county, this 13th day of April, A.D. 19........

/s/ Laverna Smith
Circuit Clerk, Suffolk County

(SEAL)

APPENDIX C

	Copies of Request	Charge for Processing		Copies of Request	Charge for Processing
Alabama	1	None	Nebraska	2	Reciprocal
Arizona	3	$5	Nevada	1	None
Arkansas	2	None	New Hampshire	2	None
California	1	None	New Jersey	2	None
Colorado	2	$5	New Mexico	2	$3
Connecticut	1	None	New York	1	None
Delaware	2	None	North Carolina	3	Reciprocal
Florida	1	$5 (To Governor)	North Dakota	3	$5
Georgia	2	*Reciprocal	Ohio	2	None
Idaho	2	None	Oklahoma	2	$2.50
Illinois	2	None	Oregon	1	None
Indiana	3	$3	Pennsylvania	2	$3
Iowa	2	$5	Rhode Island	2	None
Kansas	1	$5	South Carolina	1	None
Kentucky	1	$5	South Dakota	2	$3
Louisiana	3	$2	Tennessee	3	None
Maine	1	None	Texas	2	$1
Maryland	1	$2	Utah	1	$5
Massachusetts	1	None	Vermont	1	None
Michigan	1	Reciprocal	Virginia	1	$4**
Minnesota	2	None	Washington	1	None
Mississippi	2	None	West Virginia	1	$2
Missouri	1	$2.50	Wisconsin	1	None
Montana	1	$5	Wyoming	1	$5

*(Same charge, if any, as that made by requesting State.)

** (To State Treasurer)

APPENDIX D

THE UNIFORM CRIMINAL EXTRADITION ACT

An Act to Make Uniform the Procedure on Interstate Extradition

Be it enacted, etc.:

Sec. 1. *Definitions.* Where appearing in this act, the term "governor" includes any person performing the functions of governor by authority of the law of this state. The term "executive authority" includes the governor, and any person performing the functions of governor in a state other than this state. The term "state," referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America.

Sec. 2. *Fugitives from justice; duty of governor.* Subject to the provisions of this act, the provisions of the Constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this state.

Sec. 3. *Form of demand.* No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging, except in cases arising under section 6, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

Sec. 4. *Governor may investigate case.* When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

Sec. 5. *Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.* When it is desired to have returned to this state a person charged with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the executive authority of any other state any person in this state who is charged in the manner provided in section 23 of this act with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

SEC. 6. *Extradition of persons not present in demanding state at time of commission of crime.* The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 3 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

SEC. 7. *Issue of governor's warrant of arrest; its recitals.* If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

SEC. 8. *Manner and place of execution.* Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this act to the duly authorized agent of the demanding state.

SEC. 9. *Authority of arresting officer.* Every such officer or other person empowered to make the arrest, shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

SEC. 10. *Rights of accused person; application for writ of habeas corpus.* No person arrested upon such warrant shall be delivered over to agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

SEC. 11. *Penalty for noncompliance with preceding section.* Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in willful disobedience to the last section, shall be guilty of a misdemeanor and, on conviction, shall be fined [not more than $1,000.00 or be imprisoned not more than six months, or both].

SEC. 12. *Confinement in jail when necessary.* The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may, when necessary, confine the prisoner in the jail of the county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; *Provided however,* That such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

SEC. 13. *Arrest prior to requisition.* Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state and, except in cases arising under section 6, with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other states and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under section 6, has fled from justice, or with having been convicted of a crime in the state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

SEC. 14. *Arrest without a warrant.* The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.

SEC. 15. *Commitment to await requisition; bail.* If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under section 6, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged.

SEC. 16. *Bail; in what cases; conditions of bond.* Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the governor of this state.

SEC. 17. *Extension of time of commitment; adjournment.* If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed sixty days, or a judge or magistrate judge may again take bail for his appearance and surrender, as provided in section 16, but within a period not to exceed sixty days after the date of such new bond.

SEC. 18. *Forfeiture of bail.* If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within the state. Recovery may be had on such bond in the name of the state as in the case of other bonds given by the accused in criminal proceedings within this state.

SEC. 19. *Persons under criminal prosecution in the state at time of requisition.* If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

SEC. 20. *Guilt or innocence of accused; when inquired into.* The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

SEC. 21. *Governor may recall warrant or issue alias.* The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

SEC. 22 *Fugitives from this state; duty of governors.* Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

SEC. 23. *Application for issuance of requisition; by whom made; contents.*

I. When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein, at the time the application is made and certifying that, in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

II. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

III. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state, to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

SEC. 24. *Costs and expenses.* [When the punishment of the crime shall be the confinement of the criminal in the penitentiary, the expenses shall be paid out of the state treasury, on the certificate of the governor and warrant of the auditor; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose governor the requisition is made, and not exceeding—cents a mile for all necessary travel in returning such prisoner.]

NOTE.—The provisions in this regard will so vary with the different states that the same must be drafted separately in each state.

SEC. 25. *Immunity from service of process in certain civil actions.* A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned, until he has been convicted in the criminal proceeding, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

SEC. 26. *Written waiver of extradition proceedings.* Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in sections 7 and 8 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; *Provided, however,* That before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance or service of a warrant of extradition and to obtain a writ of habeas corpus as provided in section 10.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; *Provided, however,* That nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state.

Sec. 27. *Non-waiver by this state.* Nothing in this act contained shall be deemed to constitute a waiver by the state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under this act which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdictions in any way whatsoever.

Sec. 28. *No right of asylum; no immunity from other criminal prosecutions while in this state.* After a person has been brought back to this state by, or after waiver of extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requision for his extradition.

Sec. 29. *Interpretation.* The provisions of this act shall be so interpreted and construed as to effectuate the general purposes to make uniform the law of those states which enact it.

Sec. 30. *Constitutionality.* If any provisions of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions of this act are declared to be severable.

Sec. 31. *Repeal.* All acts and parts of acts inconsistent with the provisions of this act and not expressly repealed herein are hereby repealed.

Sec. 32. *Short title.* This act may cited as the Uniform Criminal Extradition Act.

Sec. 33. *Time of taking effect.* This act shall take effect on the .... day of .... 19.......

PRIORITY BETWEEN DEED OF TRUST AND SUBSEQUENT MECHANIC'S LIEN

*Lester F. Sumners**

There is, probably, no problem in law more perplexing than the priority of liens between innocent parties. Perhaps no more embarrassing trap exists for a young lawyer than a reliance upon a deed of trust being an unqualified first lien—questions of title aside. At the risk of recounting explorations along a trail already well known to Mississippi lawyers, this article will deal with the development of the mechanic's lien statute and its priorities over prior deeds of trust.

For a point of beginning, let us assume a typical set of facts. Builder wishes to develop vacant property as a subdivision and obtains a loan from bank for construction funds to be advanced as needed, with the loan secured by a deed of trust. Builder trades with contractor for a building on one of his subdivided lots. Bank advances funds to builder who fails to pay contractor. The result is that for 12 months contractor has a prior lien over the bank's deed of trust. Or, to change the facts slightly, assume that the bank was cautious and made advances directly to contractor until he was paid in full. The bank would have a first deed of trust lien for so much of its funds as were used in the construction but any remaining portion of the secured loan might be defeated by "extra" labor or materials ordered by builder.

How does it happen that a mortgagee, in order to enjoy security for the full amount of his loan, must be able to trace 100 per cent of the money into the purchase of land or actual cost of construction?

Mortgages existed at common law and were always recognized as security in courts of equity.[1] Artisans had a possessory lien at common law for work done on personal property.[2] Mechanic's liens, however, ". . . were neither recognized at common law nor allowed in equity."[3] The mechanic's lien, therefore, exists solely by statute and such statutes in Mississippi, though in derogation of common law, have been liberally construed to effectuate their remedial purpose.

The earliest opinion construing the mechanic's lien statute aligned Mississippi with those jurisdictions giving liberal construction in favor of the lien. "The claims of the mechanic are favored in law. They are often unlettered men . . ." and the courts will give their statutes a free interpretation in their favor.[4]

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[1] 36 Am. Jur., Mortgages § 2.

[2] 33 Am. Jur., Liens § 16.

[3] 36 Am. Jur., Mechanic's Liens § 3.

The first decision construing the mechanic's lien statute where there was a prior mortgage came in 1847 when the occupant of land, under a bond for title, failed to pay a mechanic for construction of a building. At the time of the mechanic's suit, the conditional vendee was in possession—default having been made in the payment of consideration. In dismissing the claim of a lien upon the building, the court stated that the lien can operate only to the extent of the interest of the party for whom the work was done and that the bond for title was "at least the equivalent of a mortgage."[5] The holding here was that as against the retained title in the bond for title (which is equivalent to a prior mortgage), the mechanic's lien did not attach even to the building. The only other opinion so holding followed in 1852. A mechanic claiming a lien subsequent to a recorded deed of trust sought to distinguish the preceding case by alleging that the act of 1840 had made the mechanic's lien superior to the prior deed of trust. The court dismissed this contention and held the deed of trust was a prior lien, saying, ". . . we have no hesitation in saying, that the complainant is entitled to the full benefit of his mortgage from the time it was recorded."[6] These are the only two cases holding that a mechanic's lien does not attach to the building, separate from the land, in the face of a prior deed of trust.

Otley v. Haviland[7] is the first in a line of decisions departing from the two preceding opinions. A landowner holding subject to a purchase money deed of trust contracted for a building. The mechanic recovered a judgment, thus giving him a lien on the land and building. At the execution sale Otley purchased the realty. The court held that the security of Haviland's prior deed of trust could not be impaired by the subsequent mechanic's lien but that Otley acquired the building free of all liens and might remove it from the land. The court distinguished the two former opinions as not controlling because the statute prevailing in the earlier case had been "enlarged" by the act of 1840, and the second case, although decided under the same act of 1840, was held not controlling because the court had not been presented with a clear issue of attaching the mechanic's lien to the building separate from the land.

It would seem that the theory underlying the mechanic's lien statutes and their liberal interpretation is that one innocent party should not profit at the expense of another innocent party. This theory is not mentioned in any of the opinions—most of which repeat that ". . . the claims of mechanics are favored in law. They are often unlettered men . . . ." Even if it were once true, today it can scarcely be said that mechanics are more unlettered than moneylenders. The plea, then, of counsel for an early mortgagee, though vain, comes with more force for us today:

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[4] Buck v. Brian, 3 Miss. 874 (1938). The opinion held that the act of 1821 gave a lien upon the building and the recording of the mechanic's contract (apparently unacknowledged) was notice to all subsequent purchasers.

[5] English v. Foote, 16 Miss. 444 (1847).

[6] Hoover v. Wheeler, 23 Miss. 314 (1852).

[7] 36 Miss. 19 (1858).

> "The law, when properly administered, can know no favorites . . . and no man, whatever may be his occupation, can reasonably expect, that his rights shall be more sacredly guarded than the rights of any other member of the community."[8]

Any speculation along these lines is indeed vain, for decisions following the *Otley* case affirm that a mechanic has an unqualified prior lien on the *building* which he may remove, although the building was constructed with notice of a prior recorded mortgage on the land.[9]

In 1932, for the first time, a prior deed of trust on *land* was held inferior to a subsequent mechanic's lien. The facts in *Weiss, Dreyfous & Seiferth, Inc. v. Natchez Investment Co.*[10] were not dissimilar to all the preceding cases except that here the prior deed of trust was security for *future advances for construction.* The builder, desiring to build a hotel, issued $305,000 worth of bonds secured by a first deed of trust on the land and buildings. The deed of trust "at great length" prescribed the method by which proceeds of the bonds would be disbursed to pay for the building. Contemporaneously with the deed of trust, the parties executed a construction agreement which attempted to protect the bondholders by providing: (1) that the trustee would hold the bond proceeds in a trust fund for the benefit of bondholders, subject to being disbursed for construction expenses; and, (2) that one of the trust funds be disbursed until the contractor had completed, pursuant to his contract, work to the point that the balance remaining in the trust fund would exceed the cost of work yet to be completed; and, (3) payment would be made to contractor upon certificates of satisfactory completion issued by the architects—these certificates would be approved by the builder. Builder executed a contract with a contractor for the building "but became indebted also to others for extra labor and materials for the building." After completion of the building, the builder went into hands of a receiver. The opinion of the court remarked that the statute on its face created a lien on the building and land superior to all except as to subsequent innocent purchasers, but that this Court has long since held that in face of a prior deed of trust the lien is limited to the building alone, citing the *Otley* case and others. This case, because of the "future advances for construction" clause in the deed of trust, is not controlled by these decisions, and this is a case of first impression in Mississippi. Relying upon an A.L.R. annotation,[11] the court found the general rule to be in favor of the prior deed of trust where the mechanics had actual or constructive notice since this is in accord with the equities. But, without finding the mechanics innocent of actual or constructive notice, the court announced the rule for Mssissippi as follows:

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[8] English v. Foote, supra, briefs of counsel, p. 450.

[9] Iney v. White, 50 Miss. 142 (1874); McAllister v. Clopton, 51 Miss. 257 (1875); Big Three Lumber Co. v. Curtis, 130 Miss. 74, 93 So. 487 (1922).

[10] 166 Miss. 253, 140 So. 736 (1932).

> "The lien (of the deed of trust), however, should not be extended any further than its equities require, and therefore should not be given priority, except to the extent that the money secured thereby was actually used in paying for the construction of the building."

The effect of the decision was, (1) the detailed deed of trust and construction agreement, designed to secure the mortgagees a fully paid for building, was defeated by "extras" ordered by the builder outside of the contract arrangement; and, (2) the large and necessary expense of selling the bonds, without which there would have been no building, did not apply "toward construction of the building," and the priority of the deed of trust was further reduced by this amount.

Two more decisions followed under the "future advances for construction" type deed of trust.

First National Bank of Greenville v. Virden[12] presented a classic set of equities to be resolved—two equally innocent and equally deceived claimants. Both mortgagee and contractor had placed full faith in the builder. Contractor, without inquiring into builder's title and without a written contract, began delivering supplies to the job. Bank made all of the loan advances directly to builder and was not aware of the identity of the contractor or his claim until the day before the suit. This case was controlled by the *Weiss* case, the lien of the bank being allowed priority only to the extent of the funds actually going into cost of land or construction. The *Weiss* case omits any reference to *diligence* although the mortagagees took rather elaborate and detailed steps to see that the loan funds paid for the building in full. Thus the question evolves, what does *reasonable diligence entail*?

The third of the "future advances" opinions, *Deposit Guaranty*

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[11] 5 A.L.R. 399 (1920), and 53 A.L.R. 580 (1928).

[12] 208 Miss. 679, 45 So.2d 268 (1950).

& *Trust Co. v. Weaver Lumber Co.*,[13] may not be in point here bu the wording of the opinion raises a possible question. Builder trade with contractor for a residence to be financed by a loan from bank Bank advanced money directly to contractor upon presentation of note purportedly signed by builder but which the contractor actually forged The unpaid subcontractors and materialmen gave notice and brough suit under Miss. Code Ann. § 372 (1942), seeking to bind the unpaid contract price in hands of builder. The decision apparently turns upo the finding that since builders did not authorize the bank's payment to contractor, the contract price remained unpaid to that extent. Th subcontractor and materialmen were given a prior lien on the house and lot to the extent of the unpaid contract price. The question, however, arises in the discussion of the priority and the extent of the bank's deed of trust—the determination apparently being based upon the holding of the *Weiss* case. The deed of trust was to secure future advances to the contractor or to the builder for contractor's use in building th house.

> "Since advances were made by the bank only to (contractor), the inquiry, under the rule stated in (*Weiss* case and *First National Bank of Greenville* case), was how much of such advances went into the construction of the house, and, therefore, became payments on the contract prices."

The court affirmed the chancellor's fixing of the deed of trust lien at $1,300. "This conclusion rested on (chancellor's) findings that only $1,300 of the bank's advances actually went into the house."

The import of this language seems to be that if the bank had made advances to the builder, it would be protected against subcontractors, but might be unprotected as to the contractor's lien unless it exercised "reasonable diligence" in seeing that funds went into the construction; or, if bank made advancements to contractor, it was charged with absolute responsibility for tracing its funds into actual construction.

Going back to our original hypothetical case, let us assume that the bank has failed to exercise "reasonable diligence" and that the mechanic's lien has taken priority over bank's deed of trust. How much of the undeveloped subdivision does the lien encompass, and how long does the lien survive?

Miss. Code Ann. § 356 (1942) provides that on buildings outside a city, town or village the lien shall extend to and cover one acre of land on which it may stand, and that for buildings inside a city, town or village, ". . . the lien shall extend to and cover the entire curtilage thereto belonging." The court in construing this language (apparently for the first time) in *Vinson v. Cooley*[14] held that "curtilage" could include more than one platted lot. The mechanic was given a lien on the building and lot on which it stood together with four more lots and fractions of five lots, all of which had been conveyed in a parcel and comprised one piece of property. "The court has a wide discretion in determining the extent of the land about a structure which may be reasonably required for its convenient use and occupation."

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[13] 215 Miss. 183, 60 So.2d 598 (1952).

The statute gives the mechanic a lien for twelve months from completion of work but this period may be extended by contract. Where a building contract provided for the mechanic to retain a lien until paid in full, the court sustained his lien in a suit brought more than twelve months after completion. The fact that the mechanic's lien was unknown at common law and exists solely by statute does not prevent a "contract lien in the nature of a mortgage." The court raised the question that the contract lien might waive the statutory lien but did not pass upon it, the question not being presented on appeal.[15] Adding such a contract lien to our hypothetical case, we raise the possible defense for the mortgagee that there is a waiver of the statutory lien and that the rules of the *Otley* case and the *Weiss* case are inapplicable. This would be upon the theory that the contract lien, without the statute, would not have a greater standing than the deed of trust, with priority going to the first instrument recorded. On the other hand, if the contract lien does not waive the statutory lien, the mechanic would have a lien upon the house or the house and land which would exist indefinitely. By way of summary, then, it appears that:

1. A prior recorded deed of trust on land takes precedence over a subsequent mechanic's lien as to the land but does not extend to the building on which the mechanic has a superior lien and which he may remove.
2. A "future advances for construction" deed of trust, though prior in time of recording, takes precedence over a subsequent mechanic's lien only to the extent that the secured funds actually were used in the purchase of land or cost of construction.
3. In either type of prior deed of trust, the mechanic's lien possibly may be extended more than twelve months by agreement between builder and mechanic.
4. And the mechanic's lien, if it comes ahead of the deed of trust under the rule of the *Weiss* case, may extend to several lots of a subdivision

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[14] 54 So.2d 750 (Miss. 1951).

[15] Pincus v. Collins, 198 Miss. 283, 22 So.2d 361 (1945).

rather than being limited to the platted lot on which the building stands.

How, then, may a mortgagee make a safely secured construction type loan? If there is a prime contractor, a contractor's performance bond will dispose of the claims of subcontractors and materialmen dealing with him. A contractor's bond would not protect the mortgagee against "extras" ordered by the builder outside of the contract. A possible protective policy here would be to lend no more than the prime contract price and make all advances directly to the "bonded" contractor. Conceivably, however, where the builder already owns a valuable lot it might be desirable to make a loan in excess of the actual cost of construction. Finally, in the everyday situation of a builder who wishes financing to do his own contracting, the lender is in an extremely hazardous position unless he makes all advances directly to the mechanics and materialmen—a practical impossibility.

One more ghost that may someday arise to haunt the prior mortgagee is the possibility of a subsequent federal tax lien taking priority over the "inchoate" lien of the deed of trust.[16] A federal tax claim is without the scope of this article, but, as presented in *U.S. v. Colotta,*[17] is an interesting corollary. The sequence of events was a deed of trust for a construction loan, a mechanic's lien under § 365, and finally, a federal tax lien notice for delinquent income taxes of the builder. The priority of the deed of trust was not questioned by any of the parties and the Government recognized it as being superior to their lien for taxes. The only question presented was the priority of the federal tax lien recorded subsequent to the commencement of suit on the mechanic's lien, but prior to its being reduced to judgment. The unfortunate holding was in favor of the federal tax lien over the mechanic's lien. If we assume, for argument, that the mortgagee could not trace his funds into the cost of construction, then the federal tax lien would come ahead of both the mechanic's lien and the deed of trust

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[16] Cross, Federal Tax Claims, 29 Miss. L.J. 444, p. 551 (1958).

[17] U.S. v. Colotta, 224 Miss. 33, 79 So.2d 474 (1955); *reversed on certiorari,* 350 U.S. 808 (1955); *reversed,* 224 Miss. 33, 86 So.2d 19 (1956).

STATE SOVEREIGNTY AND THE FOUNDING FATHERS—II†

*William P. Murphy**

THE PENNSYLVANIA DELEGATES

1. *Thomas Mifflin.* Titular head of the Pennsylvania delegation, Mifflin was a prosperous merchant, son-in-law of Robert Morris, and a graduate of what is now University of Pennsylvania. Although he championed colonial rights, he was slow to take a stand for independence. A delegate to both the First and Second Continental Congresses, he was quartermaster-general of the Continental army for almost three years, from which post he was relieved for inefficiency. He was a member of the cabal which sought to elevate Gates above Washington, but later resumed his friendship with Washington. He served briefly as president of Congress in 1783-84. During the Convention Mifflin made no recorded speeches, but he did sign and support the Constitution. Governor of Pennsylvania between 1790 and 1799, he supported national intervention in the Whiskey Rebellion in western Pennsylvania in 1793, but managed also during his tenure to accomodate himself to the increasing influence of Republicanism. His career was marked more by success in bending with the wind than by any fixed principles of government.

2. *Benjamin Franklin.* This remarkable man—printer, author, inventor, scientist, philanthropist, diplomat and statesman—was the oldest delegate present at eighty-one years. A true cosmopolitan, Franklin had been for almost twenty years prior to the Revolution, as resident agent in England for Pennsylvania and several other states, a diligent advocate of colonial interests. Returning in 1775, he was a delegate to the Second Continental Congress, a signer of the Declaration of Independence, and was then sent to France where he represented Congress from 1776 to 1781. He was one of the commissioners who negotiated the peace treaty with Britain. Returning again to America in 1785, he was elected president of the executive council of Pennsylvania.

Franklin was the first American to offer a plan of union for the colonies. In 1754, at the Albany conference of delegates of the northern colonies called by the Board of Trade to negotiate with the Indians, Franklin had suggested a largely self-governing confederation. This plan would have created a representative assembly with powers of war and peace, to regulate trade, and to levy and collect taxes, with a single executive appointed by the Crown. Franklin's plan was much too far ahead of the times, and neither the Crown nor the colonies approved his proposal, the one because it was too democratic, the other because it was too centralized. Later, in the Continental Congress, Franklin again was ahead of his contemporaries, offering a plan of union in 1775, a full year before Congress was ready to consider such a project.

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†This is the second installment of an article which began in 30 Miss. Law Journal 135 (1959). On line 12 on page 141 of the earlier article, "a threat for power" should read "a thirst for power."

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It is clear that considerations of state sovereignty weighed not at all with Franklin. He regarded the states as being of even less importance than did the delegates who advocated representation based on population. Thus on June 11 he stated: "I must own that I was originally of opinion it would be better if every member of Congress, or our national council, were to consider himself rather as a representative of the whole, than as an agent for the interests of a particular State; in which case the proportion of members for each State would be of less consequences, and it would not be very material whether they voted by States or individually. But as I find this is not to be expected, I now think the number of Representatives should bear some proportion to the number of the Represented; and that the decisions should be by the majority of members, not by the majority of states. This is objected to from an apprehension that the greater States would then swallow up the smaller. I do not at present clearly see what advantage the greater states could propose to themselves by swallowing the smaller, and therefore do not apprehend they would attempt it."[84] And on June 11 he declared: "An honorable gentleman has, to avoid this difficulty, hinted a proposition of equalizing the States. It appears to me an equitable one, and I should, for my own part, not be against such a measure, if it might be found practicable. If therefore in such an equal division, it should be found necessary to diminish Pennsylvania, I should not be averse to the giving a part of it to New Jersey, and another to Delaware."[85] Franklin was a supporter of the Congressional negative over state laws, as revealed on May 31 when the negative was expanded on his motion: ". . . the words 'or any treaties subsisting under the authority of the Union,' being added after the words 'contravening &c. the articles of the Union;' on motion of Dr. Franklin, were agreed to without debate or dissent."[86] And Franklin's concurrence in the nationalist positions taken by the Convention in its early weeks is evidenced by Luther Martin's report to the Maryland legislature, already referred to previously in the discussion of Washington.

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[84] 1 Records 197.
[85] 1 Records 199.
[86] 1 Records 54.

Franklin's primary role in the Convention was not the contribution of substantive provisions or the formulation of particular language. Most of his specific suggestions, in fact, were rejected. His value and service derived rather from the veneration and respect with which he was regarded, and the wisdom, detachment and humor with which he counseled the necessity for a spirit of accomodation, harmony and compromise. More than once a conciliatory speech by Franklin, which frequently had to be read for him by James Wilson, assisted the Convention in reconciling divergent opinions. A prime example of Franklin's ability to engender compromise was in the very area of dispute over proportional or equal state representation, and his proposal again revealed his attitude that attachment to state was something which had to be lived with rather than valued. On June 30 Franklin proposed: " 'That the Legislatures of the several States shall choose and send an equal number of Delegates, namely ——————— who are to compose the 2d branch of the General Legislature—That in all cases or questions wherein the Sovereignty of individual States may be affected, or whereby their authority over their own Citizens may be diminished, or the authority of the General Government within the several States augmented, each State shall have equal suffrage."[87] And when the compromise reported back to the Convention, recommending proportional representation in the lower house and equal representation in the upper, Madison recorded that "This report was founded on a motion in the Committee made by Dr. Franklin. It was barely acquiesced in by the members from the States opposed to an equality of votes in the 2d branch and was evidently considered by the members on the other side, as a gaining of their point."[88] That Franklin regarded this merely as the best possible bargain under the circumstances is indicated again by Luther Martin who later stated that "the Honorable President of Pennsylvania was a member of the committee of compromise, and there advocated the right of the large States to an inequality in both branches, and only ultimately conceded it in the second branch on the principle of conciliation, when it was found no other terms would be accepted."[89] Although not in complete agreement with all the provisions of the final document, Franklin signed the Constitution and in a speech which exemplified his whole philosophy of accepting the best that was practically possible, advocated its unanimous acceptance by the delegates.

3. *George Clymer.* A wealthy Philadelphia merchant who married the daughter of a wealthy merchant, Clymer even so was among the

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[87] 1 Records 489.
[88] 1 Records 526.
[89] 3 Records 190.

first to advocate complete independence, and was immensely proud of having signed the Declaration. He was in Congress three times during the war, where his knowledge of business affairs made him useful on committees dealing with matters of finance and commerce. He spoke little during the Convention, but supported the nationalist positions which were consistently taken by the Pennsylvania delegation. A signer of the Constitution, Clymer served in the First Congress as a Federalist.

4. *Thomas Fitzsimmons.* Another wealthy Philadelphia merchant who married a merchant's daughter, Fitzsimmons served in Congress in 1782 and later in the Pennsylvania legislature. In the Convention, he went along with the delegation, favored restricting the suffrage to freeholders, spoke but little, and then on such matters as harbor improvements and aid to manufacturing. He signed the Constitution and was a Federalist member of the House of Representatives from 1789 to 1795, supporting the entire Federalist program, especially the Hamilton financial measures. In 1810 he was on a committee of Philadelphia businessmen seeking to re-charter the bank of the United States.

5. *Jared Ingersoll.* A graduate of Yale, Ingersoll was probably the ablest jury lawyer in Philadelphia. He was elected to Congress in 1780, and from then on urged the revision or replacement of the Articles. Inexplicably, he took no active part in the Convention, so far as the records show. Ingersoll later represented the state of Georgia in the famous case of *Chisholm v. Georgia*, and argued against Hamilton in *Hylton v. United States*. This paid advocacy was contrary to his private convictions, however, which were conservative and nationalist. He regarded the principles of Republicanism as a betrayal of the Constitution, and in politics was a confirmed Federalist, even after Jeffersonianism had triumphed in Pennsylvania. Although he was put forward for vice-president by Pennsylvania Federalists in 1812, Ingersoll's principal interest was always the practice of law rather than politics.

6. *Robert Morris.* Born in England, Morris by the time of the Revolution and for twenty years thereafter was the foremost merchant, financier, speculator, and broker in America, whose far-flung economic interests reached into every section of the country and closely connected him with the most important men of the time. His enormous financial acumen was utilized in the cause of independence both in Pennsylvania and in Congress. When economic affairs reached their most critical point early in 1781, Morris was appointed by Congress as superintendent of finance, and given virtually dictatorial economic powers. By almost miraculous manipulation, Morris managed to keep the armies in the field supplied, as a result of which service (in addition to enriching himself in the process) he has forever since been known as "the financier of the Revolution." Morris' efforts during the war to obtain

money and supplies from sovereign states, as well as his natural conservatism, made him forever after a confirmed advocate of a strong central government. As a delegate to the Annapolis convention he supported the drive to achieve one. Morris was host to Washington during the Convention, nominated him for presiding officer, but did not participate in the debates. He was offered the position of Secretary of the Treasury in Washington's cabinet, but declined. Instead he became one of Pennsylvania's first Senators, and a dedicated Federalist who worked closely with Hamilton in formulating and effectuating his financial program.

7. *Gouverneur Morris.* Born into the landed aristocracy of New York, Morris graduated from King's College, then became a lawyer and politician. As a conservative, he sought to preserve the union with Britain, but supported independence when the break came. He was a member of the New York provincial Congress, a member of the New York constitutional convention, and a delegate to Congress in 1778-79. Defeated for reelection, he moved to Philadelphia, where he quickly became prominent. From 1781 to 1785 he served as chief assistant to Robert Morris, to whom he was not related.

In the Convention Morris was one of the strongest nationalists. Brilliant, witty, suave, eloquent, and of unfailing self-assurance, he was also the most frequent speaker in the debates. He was strongly in favor of representation based on population. Thus, on May 28 "It was pressed by Gouverneur Morris and favored by Robert Morris and others from Pennsylvania, that the large states should unite in firmly refusing to the small states an equal vote, as unreasonable, and as enabling the small states to negative every good system of Government, which must in the nature of things, be founded on a violation of that equality."[90] And on May 30 Morris stated that this principle was "so fundamental an article in a national government that it could not be dispensed with."[91] Consequently, he was against any compromise on the question. On July 2 "He perceived that the first branch was to be chosen by the people of the States; the second by those chosen by the people. Is not here a Government by the states? A government by compact between Virginia in the first and second branch; Massachusetts in the first and second branch, etc. This is going back to mere treaty. It is no Government at all. It is altogether dependent on the states, and will act over again the part which Congress has acted. A firm Government alone can protect our liberties."[92] On the same day Yates' notes record him as stating that "They will still have local and state prejudices. A government by compact is no government at all. You may as well go back to your congressional federal government, where, in the character of ambassadors, they may form treaties for each state."[93]

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[90] 1 Records 11.
[91] 1 Records 37.
[92] 1 Records 514.

When the compromise committee made its report, Morris was still adamant and in expressing his opposition uttered some of the strongest language against the states which was used in the Convention. On July 5 he declared that "He came here as a representative of America; he flattered himself he came here in some degree as a representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention. He wished gentlemen to extend their views beyond the present moment of time; beyond the narrow limits of place from which they derive their political origin. If he were to believe some things which he has heard, he should suppose that we were assembled to truck and bargain for our particular states. He cannot descend to think that any gentlemen are really actuated by these views . . . . As the second branch is now constituted, there will be constant disputes and appeals to the states which will undermine the General Government and control and annihilate the first branch. What results? They will immediately declare that their states will not abide by the decision, and make such representations as will produce that effect. The same may happen as to Virginia and other states. Of what avail then will be what is on paper. State attachments, and state importance have been the bane of this Country. We cannot annihilate; but we may perhaps take out the teeth of the serpents. He wished our ideas to be enlarged to the true interest of man, instead of being circumscribed within the narrow compass of a particular spot."[94]

On July 7, he stated that he "had no resolution unalterably fixed except to do what should finally appear to him right. He was against the Report because it maintained the improper Constitution of the second branch. It made it another Congress, a mere whisp of straw. It had been said (by Mr. Gerry) that the new Government would be partly national, partly federal; that it ought in the first quality to protect individuals; in the second, the states. But in what quality was it to protect the aggregate interest of the whole? Among the many provisions which had been urged, he had seen none for supporting the dignity and splendor of the American Empire. It had been one of our greatest misfortunes that the great objects of the nation had been sacrificed constantly to local views; in like manner as the general interests of states had been sacrificed to those of the counties. What is to be the check in the Senate? None, unless it be to keep the majority of the people from injuring particular states. But particular states ought to be injured for the sake of a majority of the people, in case their conduct should deserve it. Suppose they should insist on claims evidently unjust, and pursue them in a manner detrimental to the whole body. Suppose they should give themselves up to foreign influence. Ought they to be protected in such cases? They were originally nothing more than colonial corporations. On the Declaration of Independence, a Government was to be formed. The small states, aware of the necessity of preventing anarchy, and taking advantage of the moment, extorted from the large ones an equality of votes. Standing now on that ground, they demand under the new system greater rights as men, than their fellow citizens of the large states. The proper answer to them is that the same necessity of which they formerly took advantage does not now exist, and that the large states are at liberty now to consider what is right, rather than what may be expedient. We must have an efficient Government and if there be an efficiency in the local Governments the former is impossible . . . ." Commenting that at the time Germany was weak because there was more energy in the local authorties than in the general government, Morris continued: "Do gentlemen wish this to be the case here? Good God, sir, is it possible they can so delude themselves? What if all the charters and constitutions of the states were thrown into the fire, and all their demagogues into the ocean? What would it be to the happiness of America?"[95] Paterson's notes on Morris the same day read: "State-Policy not a proper object for a vigorous Government. In proportion to the vigour and strength of the state governments will be the feebleness of the general Government. We must have it in view eventually to lessen and destroy the state limits and authorities."[96] Even after the compromise was accepted by the Convention, on July 10 "Mr. Govr. Morris regretted the turn of the debate. The states, he found, had many representatives on the floor. Few, he fears, were to be deemed the representatives of America."[97]

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[93] 1 Records 518.

[94] 1 Records 529.

Morris' nationalism expressed itself in other ways. On July 17 he opposed a motion intended to protect the power of the states over their internal police, stating that "The internal police, as it would be called and understood by the states, ought to be infringed in many cases, as in the case of paper money and other tricks by which citizens of other states may be affected."[98] He was also opposed to a motion to require invitation by a governor before the national government could intervene to subdue rebellion in a state, arguing that "the executive may possibly be at the head of the rebellion. The general government should enforce obedience in all cases where it may be necessary."[99] Morris had contempt for democracy, believed in property qualifications for voting, and also advocated life tenure for the president and for senators. He foresaw that a strong national government would be opposed by state interests. "When it [the Constitution] first appears, with the sanction of this Convention, the people will be favorable to it. By degrees the state officers and those interests in the state governments will intrigue and turn the popular current against it."[100] On July 2 he stated that "It should be considered too how the scheme could be carried through the states. He hoped there was strength of mind enough in this House to look truth in the face. He did not hesitate therefore to say that loaves and fishes must bribe the demagogues. They must be made to expect higher offices under the general than the state governments. A Senate for life will be a noble bait. Without such captivating prospects, the popular leaders will oppose and defeat the plan."[101] This anxiety lest the Constitution not become operative led him to take apparently inconsistent positions. Thus, he opposed the Congressional negative on state laws, but on grounds that it would create too much opposition in the states and unnecessarily so. On July 17 "Mr. Govr. Morris opposed this power as likely to be terrible to the states, and not necessary, if sufficient Legislative authority should be given to the General Government."[102] Later the same day "Mr. Govr. Morris was more and more opposed to the negative. The proposal of it would disgust all the states. A law that ought to be negatived will be set aside in the Judiciary department and, if that security should fail, may be repealed by a National law."[103] Likewise, on September 15 "Mr. Gouverneur Morris moved to annex a further proviso 'that no state without its consent shall be deprived of its equal suffrage in the Senate,'" Madison's notes adding at this point, "This motion being dictated by the circulating murmurs of the small states . . . ."[104]

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[95] 1 Records 551.
[96] 1 Records 556.
[97] 1 Records 567.
[98] 2 Records 26.

Morris was a member of the Committee on Style to whom was given the task of putting the decisions of the Convention in final form. According to himself and Madison, Morris was the author of the language of the Constitution as we now have it. Writing to Timothy Pickering in 1814, Morris in referring to the Constitution stated that "That instrument was written by the fingers which write this letter."[105] And Madison, in 1831, wrote to Jared Sparks: "The finish given to the style and arrangement of the Constitution fairly belongs to the pen of Mr. Morris; the task having been probably handed over to him by the Chairman of the Committee, himself a highly respectable member, with the ready concurrence of the others. A better choice could not have been made, as the performance of the task proved."[106] After the Convention, Morris went to France on business in 1789, and while there was named by Washington as minister in 1792, serving until recalled at the request of France in 1794. Later he filled an unexpired Senate term in 1800-02. He regarded the ascendancy of Jefferson and Republicanism with abhorrence, denounced the embargo, and condemned the war of 1812. Eventually, his hatred of what he regarded as a departure from the principles of the Constitution induced him to approve of the Hartford Convention.

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[99] 2 Records 317.
[100] 2 Records 478.
[101] 1 Records 513.
[102] 2 Records 27.
[103] 2 Records 28.
[104] 2 Records 631.
[105] 3 Records 420.

8. *James Wilson.* Born in Scotland where he attended the Universities of St. Andrews and Edinburgh, Wilson came to America in 1763. He became a successful practicing lawyer in Philadelphia, and also a profound student of history and political philosophy. He was a member of the provincial congress in Pennsylvania, and an opponent of the 1776 state constitution enacted by the radicals. His role in the Contiental Congress in connection with the drafting of the Articles of Confederation has already been noted. Both then and in subsequent terms in Congress he consistently sought to increase the powers of the central government.

In the Convention Wilson's contribution was probably second only to that of Madison, and like Madison, Wilson was an ardent nationalist. He believed that the national sentiments originally engendered by independence had been stifled by the local interests that arose quickly when the states were formed. On June 8 he stated that "Among the first sentiments expressed in the first Congress one was that Virginia is no more, that Massachusetts is no more, that Pennsylvania is no more, etc. We are now one nation of brethren. We must bury all local interests and distinctions. This language continued for some time. The tables at length began to turn. No sooner were the state governments formed than their jealousy and ambition began to display themselves. Each endeavoured to cut a slice from the common loaf, to add to its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands. Review the progress of the Articles of Confederation through Congress and compare the first and last draft of it. To correct its vices is the business of this convention. One of its vices is the want of an effectual control in the whole over its parts. What danger is there that the whole will unnecessarily sacrifice a part? But reverse the case, and leave the whole at the mercy of each part, and will not the general interest be continually sacrificed to local interests?[107]. . . "The original draft of confederation was drawn on the first ideas, and the draft concluded on how different!"[108]

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[106] 3 Records 499.

In Wilson's conception of what the new government should be, there was a necessary and useful role for the states. They should therefore be continued in existence for the accomplishment of subordinate purposes. Early in the Convention, on June 6, the record states "Mr. Wilson would not have spoken again, but for what had fallen from Mr. Read; namely, that the idea of preserving the state governments ought to be abandoned. He saw no incompatability between the national and state governments, provided the latter were restrained to certain local purposes; or any probability of their being devoured by the former. In all confederated systems ancient and modern the reverse had happened; the generality being destroyed gradually by the usurpations of the parts composing it."[109] The next day, June 7, Wilson described the states as satellities of a national sun. "He did not see the danger of the states being devoured by the National Government. On the contrary, he wished to keep them from devouring the National Government. He was not however for extinguishing these planets as was supposed by Mr. D.......... neither did he on the other hand, believe that they would warm or enlighten the sun. Within their proper orbits they must still be suffered to act for subordinate purposes (for which their existence is made essential by the great extent of our Country.)"[110] Yates recorded him the same day as follows: "Mr. Wilson. The state governments ought to be preserved—the freedom of the people and their internal good police depends on their existence in full vigor—but such a government can only answer local purposes ."[111]

And on June 19: "Mr. Wilson observed that by a National Government he did not mean one that would swallow up the State Governments as seemed to be wished by some gentlemen. He was tenacious of the idea of preserving the latter. He thought, contrary to the opinion of Col. Hamilton that they might not only subsist but subsist on friendly terms with the former. They were absolutely necessary for certain purposes which the former could not reach. All large Governments must be subdivided into lesser jurisdictions; as examples he mentioned Persia, Rome, and particularly the divisions and subdivisions of England by Alfred."[112] Yates recorded him the same day as saying "I am for a national government, though the idea of federal is, in my view, the same. With me it is not a desirable object to annihilate the state governments, and here I differ from the honorable gentleman from New York. In all extensive empires a subdivision of power is necessary. Persia, Turkey and Rome, under its emperors, are examples in point. These, although despots, found it necessary. A general government, over a great extent of territory, must in a few years make subordinate jurisdictions."[113]

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[107] 1 Records 166.
[108] 1 Records 170.
[109] 1 Records 137.
[110] 1 Records 153.
[111] 1 Records 157.
[112] 1 Records 322.

Wilson was vehemently opposed, however, to the states having equal representation in the national legislature, viewing this as being inconsistent with a truly national government. Thus, on May 31 he stated that "He also thought it wrong to increase the weight of the state legislatures by making them the electors of the National Legislatures. All interference between the general and local governments should be obviated as much as possible. On examination it would be found that the opposition of states to federal measures had proceeded much more from the officers of the states, than from the people at large."[114] And again on June 25, "He was opposed to an election by the state legislatures. In explaining his reasons it was necessary to observe the twofold relation in which the people would stand. 1. as citizens of the General Government. 2. as citizens of their particular state. The General Government was meant for them in the first capacity; the state governments in the second. Both Governments were derived from the people—both meant for the people—both therefore ought to be regulated on the same principles. The same train of ideas which belonged to the relation of the citizens to their state governments were applicable to their relations to the General Government and in forming the latter, we ought to proceed, by abstracting as much as possible from the idea of state governments. With respect to the province and objects of the General Government they should be considered as having no existence. The election of the second branch by the Legislatures, will introduce and cherish local interests and local prejudices. The General Government is not an assemblage of states, but of individuals for certain political purposes—it is not meant for the states, but for the individuals composing them: The *individuals,* therefore, not the *states,* ought to be represented in it: . . . ."[115]

Nor did he consider equal representation necessary as any political protection to the states. On June 21 Wilson said: "It was asked how the general Government and individuality of the particular states could be reconciled to each other; and how the latter could be secured against the former? Might it not, on the other side, be asked how th former was to be secured against the latter? It was generally admitte that a jealously and rivalship would be felt between the General an particular Governments. As the plan now stood, tho' indeed contrar to his opinion, one branch of the General Government (the Senat or second branch) was to be appointed by the state legislatures. Th state legislatures, therefore, by this participation in the General Government would have an opportunity of defending their rights. Ought not a reciprocal opportunity to be given to the General Government of defending itself by having an appointment of some one constituent branch of the state Governments. If a security be necessary on one side, it would seem reasonable to demand it on the other. But taking the matter in a more general view, he saw no danger to the states from the General Government. In case a combination should be made by the large ones it would produce a general alarm among the rest; and the project would be frustrated. But there was no temptation to such a project. The states having in general a similar interest in case of any proposition in the National Legislature to encroach on the state legislatures, he conceived a general alarm would take place in the National Legislature itself, that it would communicate itself to the state legislatures, and would finally spread among the people at large. The General Government will be as ready to preserve the rights of the states as the latter are to preserve the rights of individuals; all the members of the former, having a common interest, as representatives of all the people of the latter, to leave the state governments in possession of what the people wish them to retain. He could not discover, therefore, any danger whatever on the side from which it had been apprehended. On the contrary, he conceived that in spite of every precaution the General Government would be in perpetual danger of encroachments from the state governments."[116]

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[113] 1 Records 328.
[114] 1 Records 49.
[115] 1 Records 405.

He elaborated this view on July 14. "The justice of the general principle of proportional representation has not in argument at least been yet contradicted. But it is said that a departure from it so far as to give the states an equal vote in one branch of the Legislature is essential to their preservation. He had considered this position maturely, but could not see its application. That the states ought to be preserved he admitted. But does it follow that an equality of votes is necessary for the purpose? Is there any reason to suppose that if their preservation should depend more on the large than on the small states, the security of the states against the General Government would be diminished? Are the large states less attached to their existence, more likely to commit suicide, than the small? An equal vote, then, is not necessary as far as he can conceive; and is liable, among other objections, to this insuperable one: the great fault of the existing Confederacy is its inactivity. It has never been a complaint against Congress that they governed overmuch. The complaint has been that they have governed too little. To remedy this defect we were sent here. Shall we effect the cure by establishing an equality of votes, as is proposed? No, this very equality carries us directly to Congress; to the system which it is our duty to rectify. The small states cannot indeed act, by virtue of this equality, but they may control the Government as they have done in Congress. This very measure is here prosecuted by a minority of the people of America. Is then the object of the Convention likely to be accomplished in this way? Will not our constituents say, we sent you to form an efficient Government and you have given us one more complex indeed, but having all the weakness of the former Government. He was anxious for uniting all the states under one Government."[117]

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[116] 1 Records 355.
[117] 2 Records 10.

Wilson foresaw that state officers and state interests would feel a sense of rivalry against the national government. On June 6 he declared that "The opposition was to be expected he said from the governments, not from the citizens, of the states. The latter had parted as was observed by Mr. King with all the necessary powers; and it was immaterial to them, by whom they were exercised, if well exercised. The state officers were to be losers of power. The people, he supposed, would be rather more attached to the National Government than to the state governments as being more important in itself, and more flattering to their pride. There is no danger of improper elections if made by large districts. Bad elections proceed from the smallness of the districts which give an opportunity for bad men to intrigue themselves into office."[118] And on June 20 "He insisted that a jealousy would exist between the state legislatures and the General Legislature, observing that the members of the former would have views and feelings very distinct in this respect from their constituents. A private citizen of a state is indifferent whether power be exercised by the General or state legislatures, provided it be exercised most for his happiness. His representative has an interest in its being exercised by the body to which he belongs. He will therefore view the National Legislature with the eye of a jealous rival. He observed that the addresses of Congress to the people at large had always been better received and produced greater effect than those made to the legislatures."[119]

In such circumstances national supremacy was essential. On June 7 "He hoped that the national government would be independent of state governments, in order to make it vigorous, and therefore moved that the above resolution be postponed, and that the convention in its room adopt the following resolve: That the second branch of the national legislature be chosen by districts, to be formed for that purpose."[120] And on June 9 he stated that "We have been told that each state being sovereign, all are equal. So each man is naturally a sovereign over himself, and all men are therefore naturally equal. Can he retain this equality when he becomes a member of civil government? He can not. As little can a sovereign state, when it becomes a member of a federal Government. If New Jersey will not part with her sovereignty, it is in vain to talk of Government. A new partition of the states is desirable, but evidently and totally impracticable."[121] On June 21 he declared "But where the one government clashed with the other, the state government ought to yield, as the preservation of the general interest must be preferred to a particular. But let us try to designate the powers of each, and then no danger can be apprehended, nor can the general government be possessed of any ambitious views to encroach on the state rights."[122] And on June 22: "Mr. Wilson was against the compensation as circumstances would change and call for a change of the amount. He thought it of great moment that the members of the National Government should be left as independent as possible of the state governments in all respects."[123]

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[118] 1 Records 133.
[119] 1 Records 343.

But where national power ended and state rights began was to be determined by the national government, and Wilson was therefore in favor of the Congressional negative. Thus, on June 8, "Mr. Wilson would not say what modifications of the proposed power might be practicable or expedient. But however novel it might appear, the principal of it, when viewed with close and steady eye, is right. There is no instance in which the laws say that the individuals should be bound in one case, and at liberty to judge whether he will obey or disobey in another. The cases are parallel, abuses of the power over the individual person may happen as well as over the individual states. Federal liberty is to states, what civil liberty is to private individuals. And states are not more unwilling to purchase it by the necessary concession of their political sovereignty, than the savage is to purchase civil liberty by the surrender of the personal sovereignty, which he enjoys in a state of nature. A definition of the cases in which the negative should be exercised is impracticable. A discretion must be left on one side or the other. Will it not be most safely lodged on the side of the National

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[120] 1 Records 157.
[121] 1 Records 180.
[122] 1 Records 363.
[123] 1 Records 373.

Government?"[124] And on August 23, referring to the negative "Mr. Wilson considered this as the key-stone wanted to complete the wide arch of Government we are raising. The power of self-defense had been urged as necessary for the state governments. It was equally necessary for the General Government. The firmness of judges is not of itself sufficient. Something further is requisite—It will be better to prevent the passage of an improper law, than to declare it void when passed."[125]

More, probably, than most of the delegates, Wilson had a vision of the America which was to be. On June 25 he said that "When he considered the amazing extent of country—the immense population which is to fill it, the influence which the Government we are to form will have, not only on the present generation of our people and their multiplied posterity, but on the whole globe, he was lost in the magnitude of the object."[126] And in this great future "He could not persuade himself that the state governments and sovereignties were so much the idols of the people, nor a National Government so obnoxious to them, as some supposed. Why should a National Government be unpopular? Has it less dignity? Will each citizen enjoy under it less liberty or protection? Will a citizen of Delaware be degraded by becoming a Citizen of the United States? Where do the people look at present for relief from the evils of which they complain? Is it from an internal reform of their government? No sir, it is from the National councils that relief is expected. For these reasons he did not fear, that the people would not follow us into a National Government and it will be a further recommendation of Mr. R's plan that it is to be submitted to them and not to the legislatures, for ratification."[127] Not only an apostle of nationalism, Wilson was also far in advance of most of his contemporaries in his confidence in democracy. He thought that not only the members of both houses of Congress, but also the President, should be elected by popular vote.

After the Convention was over, Wilson was the foremost advocate of ratification in Pennsylvania. In 1789 he was appointed an associate justice of the Supreme Court, a post which he held until his death. His opinion in *Chisholm v. Georgia* was a ringing affirmation of the Constitution as an ordinance of the American people creating a national government to which the sovereignty of the states had been subordinated.

THE NORTH CAROLINA DELEGATES

1. *Alexander Martin.* A graduate of Princeton, a planter, mer-

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[124] 1 Records 166.
[125] 2 Records 391.
[126] 1 Records 405.
[127] 1 Records 253.

chant and politician, Martin had been dismissed from the army for cowardice, but was elected governor in 1782 and served three terms. Although the titular head of the delegation, he was inconspicuous during the Convention. He was defeated for election as a delegate to the ratification convention, but was reelected governor. From a moderate Federalist, he changed as the political winds in his state changed, and became a Republican. Elected to the Senate in 1792, his vote for the Alien and Sedition laws contributed to his failure of reelection, but he continued his office-holding career in the state legislature.

2. *Richard Dobbs Spaight.* Son of a wealthy planter, Spaight was educated in Ireland, completing his studies at the University of Glasgow. Returning to North Carolina in 1778, he went to the state legislature, had a brief military career, served in Congress and became speaker of the state legislature. He regarded the assumption of judicial review by the Carolina courts as a usurpation. In the Convention he spoke seldom, but believed in strengthening the government. Writing to James Iredell during the Convention, he stated that "It is not probable that the United States will in the future be so ideal as to risk their happiness upon the unanimity of the whole, and thereby put it in the power of one or two states to defeat the most salutary propositions, and prevent the Union from rising out of that contemptible situation to which it is at present reduced."[128] Spaight signed the Constitution, was a member of the state convention where he actively urged ratification. Subsequently he became a Republican, serving as governor and Congressman.

3. *Hugh Williamson.* A graduate of the College of Philadelphia, Williamson was successively a minister, a mathematics professor, a doctor, a merchant and a politician. During the 1780's he served two terms both in the state legislature and in Congress, and was a delegate to the Annapolis convention. At Philadelphia he was the most active of the North Carolina delegates. He was in favor of proportional representation and thought the small states had nothing to fear from it. Thus, on June 9 "Mr. Williamson illustrated the cases by a comparison of the different states to counties of different sizes within the same state, observing that proportional representation was admitted to be just in the latter case, and could not therefore be fairly contested in the former."[129] And on June 28 "Mr. Williamson thought that if any political truth could be grounded on mathematical demonstration, it was that if the states were equally sovereign now, and parted with equal proportions of sovereignty, that they would remain equally sovereign. He could not

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[128] 3 Records 68.

[129] 1 Records 180.

comprehend how the smaller states would be injured in the case, and wished some gentleman would vouchsafe a solution of it."[130]

Although he advocated a stronger government, "Doctor Williamson professed himself a friend to such a system as would secure the existence of the state governments. The happiness of the people depended on it."[131] He also thought that "the state legislatures ought to possess independent powers in cases purely local, and applying to their internal policy."[132] Consequently, on the Congressional negative, he thought that "The national legislature ought to possess the power of negativing such laws only as will encroach on the national government."[133] But he was against giving Congress an unlimited negative on all laws it thought improper, since "that might restrain the states from regulating their internal police."[134] Apparently, he was in favor of judicial review, since he stated with reference to the proposal to include an ex post facto clause, "Such a prohibitory clause is in the Constitution of North Carolina, and though it had been violated, it has done good there and may do good here, because the judges can take hold of it."[135] Williamson signed the Constitution and worked for its ratification in North Carolina. After serving in Congress from 1789 to 1793, he retired to devote himself to literary and scientific pursuits.

4. *William Richardson Davie.* Born in England, graduated from Princeton, Davie saw continuous military service during the Revolution. He then went into law and politics, building a lucrative practice, serving in the state legislature from 1786 to 1798 and as governor in 1798. In the Convention Davie participated but little in the debates. On the question of representation in Congress, he stated on June 30: "The fact was that the local prejudices and interests which could not be denied to exist, would find their way into the national councils whether the representatives should be chosen by the legislatures or by the people themselves. On the other hand, if a proportional representation was attended with insuperable difficulties, the making the Senate the representative of the states looked like bringing us back to Congress again, and shutting out all the advantages expected from it. Under this view of the subject he could not vote for any plan for the Senate yet proposed. He thought that in general there were extremes on both sides. We were partly federal, partly national in our union. And he did not see why the government might not in some respects operate on the

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[130] 1 Records 445.
[131] 1 Records 407.
[132] 1 Records 171.
[133] 1 Records 169.
[134] 1 Records 165.
[135] 2 Records 376.

states, in others on the people."[136] As for his own idea as to the proper basis of representation, "he seemed to think that wealth or property ought to be represented in the second branch, and numbers in the first branch."[137]

Although he left the Convention in August and was not present for the signing, Davie favored the Constitution and very actively fought for its ratification in North Carolina. A confirmed Federalist in a Republican state, as governor he denounced the Virginia and Kentucky Resolutions, and his strong opposition to Jeffersonianism eventually eliminated him from politics.

5. *William Blount.* A paymaster during the war, Blount was four times a member of the lower house of the North Carolina legislature, once as speaker, twice a member of the state senate, and twice a member of Congress. During the Convention he took no part in the debates, and was absent for over a month during July and August. In July he wrote to his brother that "I must confess, notwithstanding all I heard in favor of this system, I am not in sentiment with my colleagues, for as I have said before, I still think we shall ultimately end not many years just being separate and distinct governments perfectly independent of each other."[138] On September 17, the day of the signing the Constitution, Hugh Williamson referred to Blount as being one of the members "who disliked the Constitution."[139] Blount did sign, but stated that it was not to indicate approval, but merely to "attest the fact that the plan was the unanimous act of the states in Convention."[140] He did, however, vote for ratification in the North Carolina convention. Blount later had a political career in Tennessee, where he achieved the dubious distinction of being the only man ever expelled from the U. S. Senate.

THE DELAWARE DELEGATES

1. *George Read.* A lawyer, Read had been a member of both the First and Second Continental Congresses, and had signed the Declaration of Independence. He was active in the Delaware constitutional convention in 1776 and in the legislature thereafter, and was a delegate to the Annapolis convention.

Throughout the Convention Read was outspoken against the sovereignty of the states. On June 6 he declared that "Too much attachment is betrayed to the state governments. We must look beyond their continuance. A National Government must soon of necessity swallow all of them up. They will soon be reduced to the mere office of electing the national Senate. He was against patching up the old federal system, he hoped the idea would be dismissed. It would be like putting new cloth on an old garment. The confederation was founded on temporary principles. It cannot last; it cannot be amended. If we do not establish a good government on new principles, we must either go to ruin, or have the work to do over again. The people at large are wrongly suspected of being averse to a General Government. The aversion lies among interested men who possess their confidence."[141] King recorded him the same day as follows: "Read—We must come to a consolidation—The state governments must be swept away—We had better speak out—the idea that the people will not approve perhaps is a mistake—The state magistrates may disagree but the people are with us—"[142]

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[136] 1 Records 488.
[137] 1 Records 542.
[138] 4 Records 71.
[139] 2 Records 645.
[140] 2 Records 646.

Speaking on a resolution for "guarantying republican government and territory to each state," "Mr. Read disliked the idea of guarantying territory. It abetted the idea of distinct states which would be a perpetual source of discord. There can be no cure for this evil but in doing away with states altogether and uniting them all into one great Society."[143] And according to Yates' notes, "Mr. Read against the resolve *in toto*. We must put away state governments, and we will then remove all cause of jealousy. The guarantee will confirm the assumed rights of several states to lands which do belong to the confederation."[144] And on June 26 "Mr. Read wished it to be considered by the small states that it was their interest that we should become one people as much as possible, that state attachments should be extinguished as much as possible, that the Senate should be so constituted as to have the feelings of citizens of the whole."[145]

Again on June 29, Read stated that "He should have no objection to the system if it were truly national, but it has too much of a federal mixture in it. The little states, he thought, had not much to fear. He suspected that the large states felt their want of energy, and wished for a General Government to supply the defect. He was not however so selfish as not to wish for a good General Government. In order to obtain one the whole states must be incorporated. If the states remain, the representatives of the large ones will stick together, and carry every thing before them. The executive also will be chosen under the influence of this partiality, and will betray it in his administration. These jealousies are inseparable from the scheme of leaving the states in existence. They must be done away. The ungranted lands also which have been assumed by particular states must also be given up. He repeated his approbation of the plan of Mr. Hamilton, and wished it to be substituted in place of that on the table."[146] On July 10 Read said that "He hoped the objects of the General Government would be much more numerous than seemed to be expected by some gentlemen, and that they would become more and more so."[147] And on August 8, speaking against a state residence requirement for Congressmen, "Mr. Read reminded him that we were now forming a National Government and such a regulation would correspond little with the idea that we were one people."[148]

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[141] 1 Records 136.
[142] 1 Records 143.
[143] 1 Records 202.
[144] 1 Records 206.
[145] 1 Records 424.

Read naturally was in favor of the Congressional negative, and also advocated life membership for Senators. A signer of the Constitution, Read was instrumental in bringing about its approval in Delaware, which became the first state to ratify. One of Delaware's first Senators, Read was a staunch Federalist. He resigned in 1793 to become chief justice of Delaware, a post he held until his death.

2. *Gunning Bedford.* A Princeton graduate, a lawyer and a large landowner, Bedford had been in the state legislature, a member of Congress, attorney-general of Delaware, and a delegate to the Annapolis convention. At Philadelphia he did not participate in the debates to any great extent.

Originally he was in favor of merely strengthening the Articles of Confederation. On June 30 "Mr. Bedford contended that there was no middle way between a perfect consolidation and a mere confederacy of the states. The first is out of the question, and in the latter they must continue if not perfectly, yet equally sovereign. We must like Solon make such a government as the people will approve. Will the smaller states ever agree to the proposed degradation of them? It is not true that the people will not agree to enlarge the powers of the present Congress. The language of the people has been that Congress ought to have the power of collecting an impost, and of coercing the states when it may be necessary. On the first point they have been explicit and, in a manner, unanimous in their declarations. And must they not agree to this and similar measures if they ever mean to discharge their engagements. The little states are willing to observe their engagements, but will meet the large ones on no ground but that of the Confederation. We have been told (with a dictatorial air) that this is the last moment for a fair trial in favor of a good government. It will be the last indeed if the propositions reported from the Committee go forth to the people. He was under no apprehensions. The large states dare not dissolve the confederation. If they do the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice. He did not mean by this to intimidate or alarm. It was a natural consequence which ought to be avoided by enlarging the federal powers, not annihilating the federal system. This is what the people expect. All agree in the necessity of a more efficient government, and why not make such an one as they desire."[149] For this reference to the possibility of the small states seeking foreign alliances, Bedford was rebuked by Rufus King, and he later apologized to the Convention.

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[146] 1 Records 463.
[147] 1 Records 570.
[148] 2 Records 217.

In June he was opposed to the Congressional negative, stating "And after all, if a state does not obey the law of the new system, must not force be resorted to as the only ultimate remedy, in this as in any other system? It seems as if Pennsylvania and Virginia by the conduct of their deputies wished to provide a system in which they would have an enormous and monstrous influence. Besides, how can it be thought that the proposed negative can be exercised? Are the laws of the States to be suspended in the most urgent cases until they can be sent seven or eight hundred miles, and undergo the deliberations of a body who may be incapable of judging of them? Is the National Legislature too to sit continually in order to revise the laws of the states?"[150]

But in July, once the states were assured of equal representation in the Senate, the record shows that "Mr. Bedford moved that the second member of Resolution 6 be so altered as to read 'and moreover to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.' "[151] And he defended his proposal by stating that, "It is not more extensive or formidable than the clause as its stands; no State being separately competent to legislate for the general interest of the Union."[152] Bedford subsequently was appointed a United States district judge in 1789, and held the post until his death.

3. *John Dickinson.* A lawyer and a conservative Whig, Dickinson had argued in 1767-68 against Parliament's power to tax the colonies in his well-known "Letters of a Pennsylvania Farmer." A member of both the First and Second Continental Congresses, he had opposed the radicals and refused to sign the Declaration of Independence. His role in the drafting of the Articles of Confederation has been discussed previously. Moving to Delaware, he was again a delegate to Congress in 1779, and president of the state executive council in 1781.

Dickinson never lost his preference for monarchy over republican government, but he recognized the realities. Early in the Convention he stated that "A limited Monarchy he considered as one of the best governments in the world. It was not certain that the same blessings were derivable from any other form. It was certain that equal blessings had never yet been derived from any of the republican form. A limited monarchy however was out of the question. The spirit of the times—the state of our affairs, forbade the experiment, if it were desirable."[153]

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[149] 1 Records 490.
[150] 1 Records 167.
[151] 2 Records 26.
[152] 2 Records 27.

Dickinson accepted the necessity, even the desirability, of continuing the state governments. On June 2 he said "He had no idea of abolishing the state governments as some gentlemen seemed inclined to do. The happiness of this country, in his opinion, required considerable power to be left in the hands of the states."[154] On June 6 "Mr. Dickinson considered it as essential that one branch of the Legislature should be drawn immediately from the people; and as expedient that the other should be chosen by the legislatures of the states. This combination of the state governments with the National Government was as politic as it was unavoidable. He was for a strong National Government but for leaving the states a considerable agency in the system. The objection against making the former dependent on the latter might be obviated by giving to the Senate an authority permanent and irrevocable for three, five or seven years. Being thus independent they will speak and decide with becoming freedom."[155] On June 7 he stated that "The preservation of the states in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other. To attempt to abolish the states altogether would degrade the councils of our country, would be impracticable, would be ruinous. He compared the proposed National system to the solar system, in which the states were the planets, and ought to be left to move freely in their proper orbits . . . . If the state governments were excluded from all agency in the national one, and all power drawn from the people at large, the consequence would be that the National Government would move in the same direction as the state governments now do, and would run into all the same mischiefs. The reform would only unite the 13 small streams into one great current pursuing the same course without any opposition whatever."[156] King's notes for the same day record him as saying that "We cannot abolish the states and consolidate them into one Government—Indeed if we could I should be against it—Let our Government be like that of the solar system; let the General Government be the sun and the states the planets repelled yet attracted, and the whole moving regularly and harmoniously in their respective orbits—"[157]

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[153] 1 Records 86.
[154] 1 Records 85.
[155] 1 Records 136.
[156] 1 Records 152.

When the representation dispute brought forth the New Jersey plan as a response to Virginia's proposals, "Mr. Dickinson said to Mr. Madison, you see the consequence of pushing things too far. Some of the members from the small states wish for two branches in the General Legislature, and are friends to a good National Government; but we would sooner submit to a foreign power, than submit to be deprived of an equality of suffrage, in both branches of the legislature, and thereby be thrown under the domination of the large states."[158] But it is clear that Dickinson strongly believed in the necessity of national supremacy over the states. Speaking in behalf of the Congressional negative on June 8 "Mr. Dickinson deemed it impossible to drawn a line between the cases proper and improper for the exercise of the negative. We must take our choice of two things. We must either subject the states to the danger of being injured by the power of the National Government or the latter to the danger of being injured by that of the states. He thought the danger greater from the states. To leave the power doubtful, would be opening another spring of discord, and he was for shutting as many of them as possible."[159]

And on August 14, he opposed compensation of Congressmen by the states. "Mr. Dickinson took it for granted that all were convinced of the necessity of making the General Government independent of the prejudices, passions, and improper views of the state legislatures. If the General Government should be left dependent on the state legislatures, it would be happy for us if we had never met in this room."[160] On the clause relating to suppression by the national government of domestic violence in the states, "Mr. Dickinson moved to strike out 'on the application of its legislature against.' He thought it of essential importance to the tranquillity of the U.S. that they should in all cases suppress domestic violence, which may proceed from the state legislature itself, or from disputes between the two branches where such exist."[161] And on the question of slavery, on which the defenders of state sovereignty seventy years later made their last stand, "Mr. Dickinson considered it as inadmissible on every principle of honor and safety that the importation of slaves should be authorized to the states by the Constitution. The true question was whether the national happiness would be promoted or impeded by the importation, and this question ought to be left to the National Government, not to the states particularly interested."[162]

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[157] 1 Records 159.
[158] 1 Records 242.
[159] 1 Records 167.
[160] 2 Records 292.
[161] 2 Records 466.

After the Convention Dickinson urged ratification of the Constitution in his letters signed "Fabius" but his political career was over.

4. *Richard Bassett.* Born of a tavern-keeper, Bassett was later adopted by a lawyer, from whom he learned his profession and inherited a sizeable estate. He had been in the Delaware constitutional convention, both houses of the state legislature, and a delegate to the Annapolis convention. He did not participate in the debates at Philadelphia, but is recorded as voting against the Congressional negative. He signed the Constitution, and was a leading member of the ratification convention. A Federalist Senator from 1789 to 1793, he was chief justice of the court of common pleas from 1793 to 1799, and governor from 1799 to 1801. Bassett was one of the "midnight judges" appointed by Adams just before going out of office and whose commissions were withheld by Jefferson.

5. *Jacob Broom.* Son of a blacksmith, Broom became a prosperous business man of many interests—real estate, insurance, and cotton mills. At the Convention he seldom spoke, but favored a life term for the executive and the Congressional negative.

THE GEORGIA DELEGATES

1. *William Few.* In a convention dominated by men drawn from the upper classes, Few was unique in that he was a product of the small farmer class. His family had been involved in the Regulator movement in North Carolina. Burned out by the British, they went to Georgia, where they became ardent revolutionists. Few saw military service, became a lawyer, served in the state legislature, and was twice elected a delegate to Congress. At the Convention he did not enter into the debates, but he signed the Constitution and supported it in the Georgia ratification convention. He was a U. S. Senator from 1789 to 1793, and a federal judge from 1796 to 1799. Resigning, he went to New York where he eventually became a bank president.

2. *Abraham Baldwin.* Born in Connecticut, son of a blacksmith, Baldwin managed to graduate from Yale and become a licensed minister. He taught religion at Yale and was an army chaplain during the Revolution. Turning to the law, he went to Georgia, immediately got into politics, and served both in Congress and the legislature. Although he was probably the ablest of the Georgia delegates, Baldwin participated little in the debates at the Convention. He did speak out strongly in favor of the Senate being the representative of property owners.

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[162] 2 Records 372.

With the prospect in mind of Georgia becoming a populous state, Baldwin was originally in favor of proportional representation. His subsequent switch, probably influenced by the Connecticut delegation, helped make possible the adoption of the compromise. Baldwin said that he "would have wished that the powers of the general legislature had been defined, before the mode of constituting it had been agitated,"[163] and also that "It appears to be agreed that the government we should adopt ought to be energetic and formidable, yet I would guard against the danger of becoming too formidable."[164] He was against a provision prohibiting slavery, saying that he "had conceived national objects alone to be before the Convention, not such as like the present were of a local nature."[165] Baldwin served in the House from 1789 to 1799 and in the Senate from 1799 until his death in 1807. During this period he was a faithful Republican, opposing the Hamilton policies, voting against the Alien and Sedition laws, voting to repeal the Judiciary act of 1801, and voting to convict Justice Chase.

3. *William Pierce.* Little is known of Pierce's background and early life. After serving with distinction in the Revolution, he settled in Savannah, where he engaged in a general mercantile and banking business, and was a delegate to Congress in 1787. Pierce participated little in the debates, and is remembered chiefly for his lively and interesting character sketches of the other delegates. In two instances, however, he revealed that he was no believer in state sovereignty. On May 31 he said that "It appeared clear to me that unless we established a Government that should carry at least some of its principles into the mass of the people, we might as well depend upon the present confederation. If the influence of the states is not lost in some part of the new Government we never shall have any thing like a national institution. But in my opinion it will be right to show the sovereignty of the state in one branch of the Legislature, and that should be in the Senate."[166] And on June 29 he stated: "The great difficulty in Congress arose from the mode of voting. Members spoke on the floor as state advocates, and were biased by local advantages. What is Federal? No more than a compact between states; and the one heretofore formed is insufficient. We are now met to remedy its defects, and our difficulties are great, but not, I hope insurmountable. State distinctions must be sacrificed so far as the general government shall render it necessary—without, however, destroying them altogether. Although I am here as a representative from a small state, I consider myself as a citizen of the

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[163] 1 Records 469.
[164] 1 Records 475.
[165] 2 Records 372.
[166] 1 Records 59.

United States, whose general interest I will always support."[167] Pierce left the Convention in August and was not present for the signing of the Constitution. He explained this by writing to a friend that "I was absent in New York on a piece of business so necessary that it became unavoidable. I approve of its principles, and would have signed it with all my heart, had I been present."[168]

4. *William Houstoun.* Son of a royal officer in the government of Georgia, Houstoun was educated and studied law in England. The known details of his life are meager. His role in the Convention was insignificant, and he left when it was about half over. Commenting on the proposal to guarantee the states a republician form of government, he said that he "was afraid of perpetuating the existing constitutions of the states. That of Georgia was a very bad one, and he hoped would be revised and amended."[169] The constitution he referred to was the one drawn up by the radicals in 1777, providing for a unicameral legislature and broad suffrage rights. Houstoun also opposed the equal representation of the states in the Senate.

THE NEW YORK DELEGATES

1. *John Lansing.* Descendant of an old Dutch family, Lansing was an Albany lawyer who had been in the legislature for six terms, and speaker for two years. He had been mayor of Albany, and a member of Congress in 1784-85. In the Convention Lansing was an outspoken opponent of the idea of forming a national government, not only because he considered it as being beyond the power of the Convention, but because he believed that it would destroy the sovereignty of the states.

On June 16 "Mr. Lansing called for the reading of the 1st resolution of each plan, which he considered as involving principles directly in contrast; that of Mr. Patterson, says he, sustains the sovereignty of the respective states, that of Mr. Randolph destroys it. The latter requires a negative on all the laws of the particular States; the former, only certain general powers for the general good. The plan of Mr. R. in short absorbs all power except what may be exercised in the little local matters of the states which are not objects worthy of the supreme cognizance."[170] Yate's notes for the same day record Lansing as comparing the Paterson plan with the one offered by Virginia: "This system is fairly contrasted with the one ready to be reported—the one federal, and the other national. In the first, the powers are exercised as flowing from the respective state governments—The second, deriving its authority from the people of the respective states—which latter must ultimately destroy or annihilate the state governments."[171]

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[167] 1 Records 474.
[168] 3 Records 100.
[169] 2 Records 48.
[170] 1 Records 249.

On June 20, addressing himself to the proposal for a Congressional negative, Lansing declared "It is proposed that the General Legislature shall have a negative on the laws of the states. Is it conceivable that there will be leisure for such a task? There will, on the most moderate calculation, be as many acts sent up from the states as there are days in the year. Will the members of the General Legislature be competent judges? Will a gentleman from Georgia be a judge of the expediency of a law which is to operate in N. Hampshire? Such a negative would be more injurious than that of Great Britain heretofore was. It is said that the National Government must have the influence arising from the grant of offices and honors. In order to render such a Government effectual he believed such an influence to be necessary. But if the states will not agree to it, it is in vain, worse than in vain to make the proposition. If this influence is to be attained, the states must be entirely abolished. Will any one say this would ever be agreed to? He doubted whether any General Government equally beneficial to all can be attained. That now under consideration, he is sure, must be utterly unattainable. He had another objection. The system was too novel and complex. No man could foresee what its operation will be either with respect to the General Government or the state governments. One or other, it has been surmised, must absorb the whole."[172] Yates' notes of the same day record Lansing as follows: "I am clearly of opinion that I am not authorized to accede to a system which will annihilate the state governments, and the Virginia plan is declarative of such extinction. And I hold it as an undoubted truth, as long as state distinctions remain, let the national government be modified as you please, both branches of your legislature will be impressed with local and state attachments. This national government will, from their power, have great influence in the state governments; and the existence of the latter are only saved in appearance. And has it not been asserted that they expect their extinction?"[173]

Concluding that the Convention was acting beyond its powers to create a national government destructive of state sovereignty and that they were powerless to stop it, Lansing and his colleague Yates left the Convention on July 10 and did not return. Lansing opposed the Constitution in the New York convention. Subsequently he served as a judge from 1790 to 1814. On a visit to New York in 1829, he disappeared. No trace was ever found of him and the circumstances remain unknown.

2. *Robert Yates.* Another Albany lawyer, Yates had been a radical

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[171] 1 Records 257.
[172] 1 Records 337.
[173] 1 Records 345.

Whig, a member of the various New York provincial Congresses, and was appointed in 1777 a judge of the New York Supreme Court. He was a staunch supporter of Governor Clinton during the 1780's, which meant that he was very much anti-Federalist. In the Convention he voted, on May 30, against the motion to establish a national government. In his notes for June 9, he recorded his own ideas as follows: "Upon the whole, every sovereign state according to a confederation must have an equal vote, or there is an end to liberty. As long therefore as state distinctions are held up, this rule invariably apply; and if a consolidated national government must take place, then state distinctions must cease, or the states must be equalized."[174]

Upon leaving the Convention, Yates and Lansing set forth the reasons for their action in a report to Governor Clinton. They wrote: "It is with the sincerest concern we observe, that, in the prosecution of the important objects of our mission, we have been reduced to the disagreeable alternative, of either exceeding the powers delegated to us, and giving our assent to measures which we conceive destructive to the political happiness of the citizens of the United States, or opposing our opinions to that of a body of respectable men, to whom those citizens have given the most unequivocal proofs of confidence. Thus circumstanced, under these impressions, to have hesitated, would have been to be culpable. We therefore gave the principles of the constitution, which has received the sanction of a majority of the convention, our decided and unreserved dissent; but we must candidly confess that we should have been opposed to any system, however modified, which had in object the consolidation of the United States into one government."[175] Then, referring to the instructions which they had received on going to the Convention, they continued: "From these expressions, we were led to believe, that a system of consolidated government could not in the remotest degree, have been in the contemplation of the legislature of this state, for that so important a trust, as the adopting measures which tended to deprive the state government of its most essential rights of sovereignty, and to place it in a dependent situation, could not have been confided by implication . . . . Reasoning in this manner we were of opinion, that the leading feature of every amendment, ought to be the preservation of the individual states, in their uncontrolled constitutional rights . . . ."[176] They then set forth various reasons why a general government was undesirable, and stated that "These reasons were, in our opinion, conclusive against any system of consolidated government: to that recommended by the convention, we suppose most of them very forcibly apply[177] . . . . We were not present at the completion of the new constitution, but before we left the convention, its principles were so well established, as to convince us, that no alteration was to be expected, to conform it to our ideas of expediency and safety. A persuasion, that our further attendance would be fruitless and unavailing, rendered us less solicitous to return."[178]

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[174] 1 Records 183.
[175] 3 Records 244.
[176] 3 Records 245.

Yates opposed the ratification of the Constitution in the New York convention. Accepting the result, however, he ran for governor the next year as a Federalist candidate against Clinton, but was defeated. He became chief justice of the New York Supreme court in 1790, serving until 1798. In 1795 he reverted to his anti-Federalism and ran again for governor, this time against John Jay, and was again defeated.

3. *Alexander Hamilton.* Born in the West Indies, this authentic genius entered King's College in 1773 and the next year, at the age of seventeen, wrote brilliant and penetrating pamphlets on the relations between the colonies and England. In 1777, at the age of twenty, Hamilton became Washington's aide and secretary, rendering invaluable service until he resigned in 1781. The next year, after three months study, he was admitted to the New York bar and was immediately elected to Congress.

Hamilton was one of the first Americans to think along truly national lines, and even before the Articles had been ratified, he correctly diagnosed their fatal weakness and prescribed the necessary remedy. Writing to James Duane in 1780, Hamilton said that "The idea of an uncontrollable sovereignty in each state over its internal police will defeat the other powers given to Congress, and make our union feeble and precarious."[179] In order to remedy this weakness, Hamilton suggested "calling immediately a convention of all the states, with full authority to conclude finally upon a general confederation"[180] which would give Congress the necessary powers. Reference has already been made to Hamilton's drafting, at the Annapolis convention, of the call for the Philadelphia convention, and his role in placing the New York legislature on record in favor of the move. Actually, Hamilton's greatest contribution to the establishment of the Constitution came before and after the Convention rather than in the convention itself. There he was consistently outvoted by Yates and Lansing in determining the New York vote, and finally left, returning only after they had in turn departed. Hamilton remained thereafter to sign the Constitution on behalf of New York.

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[177] 3 Records 246.

[178] 3 Records 247.

[179] Quoted in Curtis, Constitutional History of the United States p. 237, f.n. 3. (1897).

[180] Supra note 179 at p. 238.

On June 18, after the Virginia and New Jersey plans had both been advanced, Hamilton made his principal speech of the Convention. "He was obliged therefore to declare himself unfriendly to both plans. He was particularly opposed to that from New Jersey, being fully convinced, that no amendment of the confederation, leaving the states in possession of their sovereignty, could possibly answer the purpose."[181] After referring to the sovereignty of the states and "the ambition of their demagogues," Hamilton continued: "How then are all these evils to be avoided? Only by such a complete sovereignty in the General Government as will turn all the strong principles and passions above mentioned on its side . . . . The general power, whatever be its form, if it preserves itself, must swallow up the state powers, otherwise it will be swallowed up by them. It is against all the principles of a good government to vest the requisite powers in such a body as Congress. Two sovereignties can not co-exist within the same limits. Giving powers to Congress must eventuate in a bad government or in no government. The plan of New Jersey therefore will not do. What then is to be done? Here he was embarrassed. The extent of the country to be governed discouraged him. The expense of a General Government was also formidable; unless there were such a diminution of expense on the side of the state governments as the case would admit. If they were extinguished, he was persuaded that great economy might be obtained by substituting a General Government. He did not mean however to shock the public opinion by proposing such a measure. On the other hand he saw no other necessity for declining it. They are not necessary for any of the great purposes of commerce, revenue, or agriculture. Subordinate authorities, he was aware, would be necessary. There must be distinct tribunals; corporations for local purposes. But *cui bono,* the vast and expensive apparatus now appertaining to the states. The only difficulty of a serious nature which occurred to him, was that of drawing representatives from the extremes to the center of the community."[182]

Hamilton then offered his own plan for a government with "supreme" legislative, executive and judicial branches. The legislature, in which the Senators were to hold office for life, was to have "power to pass all laws whatsoever" subject to the absolute veto of the executive who was also to hold office for life. In order to assure national supremacy, the plan provided that "All laws of the particular states contrary to the Constitution or laws of the United States to be utterly void; and the better to prevent such laws being passed, the Governor or president of each state shall be appointed by the General Government and shall have a negative upon the laws about to be passed in the state of which he is Governor or President."[183] Hamilton's notes for his speech that day, after setting forth the objections to the confederation, contain the following comments:

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[181] 1 Records 283.
[182] 1 Records 286-87.

> "IV There seem to be but three lines of conduct.
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> I. A league offensive and defensive, treaty of commerce, and apportionment of the public debt.
>
> II. An amendment of the present confederation by adding such powers as the public mind seems nearest being matured to grant.
>
> III. The forming a new government to pervade the whole with decisive powers, in short, with complete sovereignty."[184]

Lest there should be misunderstanding of his position, Hamilton arose the next day to state that "He had not been understood yesterday. By an abolition of the states, he meant that no boundary could be drawn between the National and state legislatures; that the former must therefore have indefinite authority. If it were limited at all, the rivalship of the states would gradually subvert it. Even as corporations the extent of some of them as Virginia, Massachusetts, etc. would be formidable. As states, he thought they ought to be abolished."[185]

On June 21 he opposed a motion that the manner of electing the lower house of Congress be left to the state legislatures. "Col. Hamilton considered the motion as intended manifestly to transfer the election from the people to the state legislatures, which would essentially vitiate the plan. It would increase that state influence which could not be too watchfully guarded against. All too must admit the possibility, in case the General Government should maintain itself, that the state governments might gradually dwindle into nothing. The system therefore should not be engrafted on what might possibly fail."[186] And on June 29 he opposed equal representation in Congress, stating that "But as states are a collection of individual men, which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition. Nothing could be more preposterous or absurd than to sacrifice the former to the latter."[187] As quoted by Yates, Hamilton said that "The question, after all is, is it our interest in modifying this general government to sacrifice individual rights to the preservation of the rights of an artificial being, called states?"[188]

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[183] 1 Records 293.
[184] 1 Records 304.
[185] 1 Records 323.
[186] 1 Records 358.
[187] 1 Records 466.
[188] 1 Records 473.

During his absence from the convention, Hamilton wrote to Washington on July 3 that "The prevailing apprehension among thinking men is that the Convention, from a fear of shocking the popular opinion, will not go far enough."[189] After he returned to the Convention, on September 6 "Mr. Hamilton said that he had been restrained from entering into the discussions by his dislike of the scheme of government in general; but as he meant to support the plan to be recommended, as better than nothing, he wished in this place to offer a few remarks."[190]

Hamilton's contribution to the ratification of the Constitution by writing most of the Federalist Papers is well-known. Even more remarkable, however, was his role in the ratification fight in New York where he succeeded, in one of the most amazing individual performances which ever took place in any popular assembly, in persuading a hostile convention to approve the constitution. His subsequent career as Washington's Secretary of the Treasury, his financial measures, his advocacy of a broad construction of the powers of the central government to achieve the purposes of the Constitution, were all consistent with the philosophy of nationalism which he had espoused from the beginning.

[EDITOR"S NOTE: The final installment of this article will appear in the December, 1959, issue of the MISSISSIPPI LAW JOURNAL.]

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[189] 3 Records 53.
[190] 2 Records 524.

TAXATION—UNINCORPORATED ASSOCIATIONS AND THE MEDICAL PROFESSION

*Elwood L. Edwards**

Much publicity has been given recently to a bill passed by the United States House of Representatives which provides favorable tax treatment, such as that enjoyed by corporations, to professional and self-employed individuals who contribute a portion of their income to retirement plans. Bills such as H.R. 10 (Self-Employed Individuals' Retirement Plan of 1959), have been presented to Congress many times over the last ten years. None of the bills previously presented have passed both Houses, and it seems unlikely, considering present governmental spending, that this latest bill will be enacted.

This article is dedicated to the proposition that it is possible for certain groups of physicians and other professional people, prohibited from incorporating by state statutes, to secure the benefits of such a bill under our existing tax law.

A group of physicians in Montana, previously operating as a partnership, entered into an agreement to conduct their medical practice as an Association. The Articles of Association of this group gave it many of the attributes of a corporation, and, subsequent to the execution of this Agreement, a pension plan was established for the employees—including the physicians who were formerly members of the partnership. The Association contended that it was taxable as a corporation under the provisions of the Internal Revenue Code, and, therefore, it had the right to establish a tax-exempt pension plan. This plan was tested in the case of *United States v. Kintner*,[1] and the physicians' contention was sustained.

The Internal Revenue Service, however, was unhappy with this decision and announced this fact to the remaining circuits in Revenue Ruling 56-23, C.B. 1956-1 598, which held that a group of physicians who adopt the form of an Association in order to obtain the benefits of corporate status for purposes of section 401 (a) of the Internal Revenue Code of 1954, (tax-exempt pension and profit sharing plans), is in substance a partnership for all purposes of the Internal Revenue Code. In spite of the fact that many groups of physicians in various sections of the United States attempted to qualify under such a plan subsequent to the *Kintner* decision, the Internal Revenue Service continued to maintain its position until late in 1957. At the time Revenue Ruling 57-546 was issued which stated the position of the Service to be that even though an Association establishes a pension plan under section 401 (a) of the Internal Revenue Code of 1954, this fact is not determinative of whether such organization will be classified as a partnership or an association taxable as a corporation. The *usual tests* will be applied in determining whether a particular organization of physicians or other professional groups has more characteristics of a corporation than of a partnership.

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[1] 216 F.2d 418 (9th Cir. 1954).

The tests which must be met by an Association in order to be taxable as a corporation are described in the Internal Revenue Code, the Regulations, and the decided cases.

Section 7701 of the Internal Revenue Code of 1954 is entitled "Definitions," and the portion of that section dealing with corporations reads as follows:

> "(3) CORPORATION—The term 'corporation' includes associations, joint stock companies, and insurance companies."

The general provisions of section 7701 state that when used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the term corporation includes associations, joint stock companies and insurance companies.

There is no definition under this section of the term "association", but Regulation 111, section 29.3739-2, 26 Code of Federal Regulations, 1949 edition, reads as follows:

> "The term 'associations' is not used in the Internal Revenue Code in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise."

Under section 7701 of the 1954 Code, the term "partnership" is defined as follows:

> "The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on and which is not, within the meaning of this title, a trust, an estate or a corporation; . . ."

Regulation III, section 29.3997-4, 26 Code of Federal Regulations, 1949 edition, reads in part as follows:

> ". . . If an organization is not interrupted by death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or more persons in their representative capacities, such an organization is an association, taxable as a corporation."

The Supreme Court of the United States has applied these tests in more than one instance and the cases cited below set out the characteristics which cause a group to be considered a corporation for Federal Income Tax purposes.

In the case of *Morrisey v. Commissioner*,[2] the Supreme Court of the United States held that an organization could be an association and taxable as a corporation for the years 1924 to 1926, when it was created for the development of a tract of land for the construction and operation of a golf course, club house, etc., and with broad powers for purchase, operation, and sale of properties. The court based its decision on the facts that the arrangement provided for centralized control, continuity and limited liability. The court also mentioned the fact that the analogy to corporate organization was carried still further by the provisions for issuance of transferable certificates.

In the case of *Helvering v. Combs*,[3] the Court held that the fact the beneficiaries did not hold a meeting, that the trust had no office or place of business, no seal, by-laws or official name, and the operations of the trustee were confined to the one lease they acquired, were not determinative factors. The court said that here, through the medium of a trust, the parties secured centralized managment of their enterprise, continuity during the trust term without elimination or interruption by death or changes in the ownership of the interest, limited liabilities, and transferable beneficial interest evidenced by certificates. The court opined that the beneficiaries had thus avoided the characteristic responsibilities of partners and secured advantages analogous to those which pertain to a corporate organization.

The case which first applied the foregoing tests to the problem of an association of physicians and a tax-exempt pension plan was the case of *United States v. Kintner*.[4] The court there applied the "usual tests" and concluded that the association of physicians involved in that case bore more resemblance to a corporation than to a partnership. Consequently, the court held that the association should be taxed as a corporation and that the contributions to the pension trust established by the association were contributions to an exempt trust.

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[2] 296 U.S. 344 (1935).

[3] 296 U.S. 365 (1935).

[4] 216 F.2d 418 (9th Cir. 1954).

The principal points which the court in the *Kintner* case relied upon to distinguish a corporation from a partnership are:

(1) centralized control by a small number,
(2) continuity,
(3) limitation of liability.

The articles of association of the group involved in the *Kintner* case provided that the business be managed by an executive committee composed of five members elected by the entire group. These articles further provided that the association shall not terminate on the death or withdrawal of a member but shall continue until the death of the last survivor of the original members. They also provided that only the individual member was to be liable to third parties for his professional misconduct. The court comments on this provision in the following language:

> "Although the Articles of Association disclaim liability to others for the negligence or lack of skill of the doctors, the association which contracts with the patients and receives his fees would be responsible directly to the patient . . . ."

The court goes on to say that even though this attempt to limit liability is probably not effective, "It follows that the nonliability clause does not stand in the way of considering the association before us a corporation rather than a partnership for federal income tax purposes . . . ."

The United States Court of Appeals for the Sixth Circuit has decided cases which may be considered indicative of what its position will be if the question of a physicians' association is presented to it. In the companion cases of *Commissioner v. Fortney Oil Company* and *Commission v. Townline Oil Company,*[5] the question presented was whether taxpayers were associations within the meaning of section 1001 (a) (2) of the Revenue Act of 1936, and thereby subject to income tax as corporations.

> Section 1001 (a) (2), Revenue Act of 1936 reads in part as follows: "The term 'corporation' includes associations, joint-stock companies, and insurance companies."

Treasury Regulation 94, promulgated under the Revenue Act of 1936, Article 1001-2:

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[5] 125 F.2d 955 (6th Cir. 1942).

> "The term 'association' is not used in the act in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity . . . ."

In the first case the Fortney Oil Company, a Michigan corporation which held a lessee's interest in a certain oil and gas lease, assigned various fractional undivided shares amounting in all to about two-thirds of its interest in the leasehold to thirteen individuals under separate identical agreements. These agreements gave the company as "trustee" broad power, for the entire life of the lease, to manage and control the drilling and operation of oil and gas wells on the premises covered by the lease and to pay all expenses involved in such development and operation. Articles 5, 6 and 7 of this agreement are set out in part below:

> "Fifth. It is understood, and as to his proportionate share, the assignee herein assumes the obligations and agreements herein contained, and the obligations and agreements of the assignees in the certain oil and gas lease covering the acreage herein described, but that nothing herein contained shall be construed as constituting the operations under this or any other part-assignment of said lease, a mining partnership, or other than a venture by tenants in common of said lease-hold estate.
>
> Sixth. The Trustee shall have the right to expend the money contributed by the assignee under this assignment of the payment of said lease and drilling the well or wells.
>
> Seventh. This agreement shall be binding upon the parties hereto and their successors and assigns . . . ."

The facts in the second case are very similar to those in the first case. A portion of the court's language reads:

> "The agreements expressly provide that failure to pay a proportionate share of any assessment necessary for the continuation of development would result in reversion to the assignors of the assignee's interest in the undrilled portion of the property. Transfer of an assignee's interest to a successor or assign would not affect the continuity of the ventures. Unified control of the property in each case was thus completed and its continuity was assured. There can be no doubt that operations were conducted for profit and that

> the assignees were entitled to share in the gains of the enterprises. Under treasury regulation 94, article 1001-2, this clearly constitutes an association . . . ."

The Court also held, with regard to article five of the agreement, wherein the parties attempted to fix their status, that "the parties in each case endeavored by the contract to exclude any relationship of partnership and to fix the status of the operation as a venture by tenants in common of said lease-hold estate." This contract could not control the status nor or we bound in this instance by the decisions of state courts, for the act of Congress fixing the tests and establishing the definitions of the word "association" controls entirely as to questions of Federal Taxation.[6]

The court based its decision that this was an association and taxable as a corporation on two principal facts. There was continuity of life and centralized control.

It should be noted that section 1001 (a) (2) of the Revenue Act of 1936 has exactly the same wording as section 7701 of the 1954 Internal Revenue Act. It should also be noted that the section of the regulations defining association which was cited in the foregoing case, Treasury Regulation 94, Article 1001-2, reads exactly the same as Regulation III, Section 29.3739-2, 26 Code of Federal Regulations, 1949 edition.

In addition to the other corporate attributes which have been discussed, the Articles of Association of a medical association could provide for annual meetings of the holders of certificates of ownership; use of proxies; annual election of an executive committee; election of officers, president, vice-president and secretary-treasurer, to perform ordinary corporate duties of such officers; power to fix salaries in the executive committee; assets to be held in the name of the association and various other qualities that ordinarily are found in corporations. The association should employ the physicians, bill the patients, and withhold social security and withholding tax from all of its employees just as if it were a corporation.

Considering the cases, Code Section, and Regulations, which support the *Kintner* case, it seems inevitable that the Internal Revenue Service must adopt the holdings of this decision. No official comment has been made on this problem in more than a year, but the Internal Revenue Service has reported unofficially that the criteria for determining whether or not a group of physicians or other professional people meet the test, and are therefore able to establish a tax-exempt pension plan, will be set forth in the regulations. So far these regulations have not been issued, but it has been indicated that the final determination as to the right of a group of physicians to establish such a plan would be dependent on three separate determinations.

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[6] Hecht v. Malley, 265 U.S. 144 (1924); Weiss v. Wuiner, 279 U.S. 333, 337 (1929).

First, the physicians must be operating as an association which is taxable as a corporation under federal income tax laws. The Articles of Association of the group must be carefully drawn so as to make it as closely akin to the corporate form of operation as possible under the state laws restricting the right of a corporation to practice medicine. The drafting of this agreement is a legal problem in which both the Federal tax laws and the laws of each state should be considered.

This first determination we understand will be made by the Corporate Ruling Section of the Internal Revenue Service. Once this hurdle is passed, two further steps will be necessary to obtain approval.

Very close scrutiny will be given by the Employment Tax Section as to whether an employer-employee relationship exists between the physicians and the association. This determination will likewise be based upon the right of the governing body of the assocation to hire and fire its physician participants, to designate their activities, control their compensation, and, in addition to this, whether the association will continue in uninterrupted existence in the event of the death, resignation or removal of one or more of the physician members.

In the event these two tests are met and both the Corporate Ruling Section and the Employment Tax Section have approved the association's operation, the examination of the association's pension or profit sharing plan will then be considered by the same standards and rules as any other small business corporation.

High taxes and high living costs make it almost impossible for professional and self-employed persons to save for retirement out of current income. Through the use of qualified pension and profit sharing trusts, it has been possible, for some time, for corporations to provide retirement benefits for their employees. There is no apparent reason for allowing this tax advantage to employees of a corporation and denying it to persons who are members of a partnership or otherwise self-employed. With the *Kintner* case as a guide, it is believed that substantial tax advantages can be secured by groups of physicians and other professional people by the use of the association form of doing business, regardless of the fate of H. R. 10 in the Senate.

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Student Comments

THE DOCTRINE OF CY PRES IN CHARITABLE TRUSTS—ITS NEED IN MISSISSIPPI*

". . . the cy pres power is no part of the judicial system of our government." So stated the Mississippi Supreme Court in *National Bank of Greece v. Savarika.*[1] It is the purpose of this article to analyze Mississippi's position in two respects: (1) its relationship to the present trend and authority in the United States; and, (2) its effect on the use of the charitable trust in Mississippi. In so doing, it will be necessary to consider the origin and history of the doctrines of cy pres, both in Europe and in the United States, and to consider the operation of the doctrine as applied to charitable trusts.

I. Origin

Cy pres is a derivation of the Norman-French expression "Cy pres comme possible" which means as near as possible or as near as may be.[2] As it is used in the administration of charitable trusts, the doctrine means that the Court, under proper circumstances, will apply the res of the trust as near as possible to the intenton of the settlor. Although the words "cy pres" are derived from the Norman-French, the doctrine does not look to the Law of France, nor to the Common Law of England for its origin. The use of the doctrine antedates Christianity, and early reported cases dealing with the doctrine can be found in the French, Spanish and Roman Law.[3]

> ". . . In the Pandects of Justinian we find cases to the same effect . . . Amongst others, in the Digest, lib. 33, tkt. 2, law 16, a case is reported which occurred in the early part of the third century. in which a legacy was offered to a city in order that from the yearly revenues games might be celebrated for the purpose of preserving the memory of the deceased. It was not lawful at that time to celebrate these games. The question was, what was to be done with this legacy; Modestinus, a celebrated jurist of authority, replied: 'Since the testator wished games to be celebrated which were not permitted, it would be unjust that the amount which he had destined to that end should go back to the heirs. Therefore let the heirs and magnates of the city be cited, and let an examination be made to ascertain how the trust may be employed so that the memory of the deceased may be preserved in some other and lawful manner . . . .'"[4]

It is seen that the doctrine is not peculiar to the English Common Law, but was first used in the Continental systems. However, it is not certain that the Continental systems were the birthplace of the English doctrine of cy pres. English authority[5] cites two possible origins for the doctrine as practiced in England. One is the previously mentioned use on the Continent, the other the peculiar practices of medieval England and their effect on the administration of trusts. During this period of English history, the influence of the Church was strongly felt. In many instances, a person made his Last Confession and his Last Testament at the same time, and it is known that a person, properly impressed by the presence of a priest and the gravity of the moment, made pious bequests in the hope that this charity might win favor for him in the Life hereafter. Also, during the medieval period, it was the Ordinary, i.e., the Bishop, who was charged with the administration of estates, and it is known that he favored the administraton and disposition of the pious bequests regardless of the obstacles.[6] The administration of the pious bequests in a manner different from that specified by the testator was justified on the ground that there was a general principle of piety in the bequest.[7] After the Reformation, the administration of Charities fell into the hands of the Chancellors who were heirs to a tradition firmly established by their ecclesiastical predecessors. It is believed that the doctrine of cy pres was resurrected by the Chancellors in an effort to uphold charitable bequests which were made in an attempt to purchase one's salvation,[8] the general theory being that a testator made the charitable bequest in order to gain a place in Heaven, and that it would be wrong for the Court to allow the bequest to fail for reasons unknown to the testator when such a failure would deny the testator his attempted expiation of sins, and would give the property to his heirs at law, contrary to his intention. "In what the doctrine originated, whether . . . in the principles of the Civil Law . . . or in the religious notions formerly entertained in this country, I know not . . . ."[9] Although the exact origin of the doctrine could not be determined, this did not prevent the doctrine from becoming an established part of the English Common Law.

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*Recipient of the 1959 Deposit Guaranty Bank and Trust Company Award.

[1] 167 Miss. 571, 148 So. 649 (1933).

[2] Bogert, Trusts and Trustees § 431 (1935).

[3] Late Corporation of Latter Day Saints v. United States, 136 U. S. 1, 53 (1889).

[4] See note 3 supra.

In England, there are two branches of the cy pres doctrine: (1) the judicial; and, (2) the prerogative. Judicial cy pres is exercised by the Chancellor as a part of the inherent power of a court of equity. It existed independently of statute, and although there has been confusion on the point, it is generally recognized that the statute of 43 *Elizabeth c.* 4, dealing with charitable uses, is merely a confirmation of the cy pres power and is not the source of the power.[10] Judicial cy pres was always concerned with the general intention of the donor-testator, and cases in which the judicial power was invoked were decided in accordance with the general charitable intention of the donor-testator.[11]

Prerogative cy pres was a power belonging to the sovereign who acted as "parens patriae" of his people.[12] When a case, which involved the use of the prerogative power, arose, the Crown, at the suggestion of the Attorney-General, directed the disposal of the property under the Sign Manual, i.e., under the royal signature.[13] As the power was prerogative, no regard for the intention of the testator was necessary, and in most cases the choice of the final disposition was purely arbitrary.[14] The prerogative power was later delegated to the Chancellor,[15] as keeper of the King's conscience. As a result, the same judicial officer was charged with the exercise of a purely judicial duty, the judicial cy pres; and the exercise of a purely ministerial duty, the Sign Manual. Eventually, the exercise of these two separate powers by the same tribunal took its toll, and as the number of cases decided under the two cy pres powers increased, it became more and more difficult to distinguish between the two and it soon became virtually impossible to determine which power had been exercised in any given case. This very confusion of the two powers under the one title of "cy pres" was to have a very definite effect on the acceptance of the doctrine in the United States.

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[5] Moggridge v. Thackwell, 7 Ves. 36 (1802).

[6] Gray, The History and Development in England of The Cy-Pres Principle in Charities, 33 B. U. L. Rev. 30 (1950).

[7] See note 5 supra.

[8] Fisch, The Cy Pres Doctrine and Changing Philosophies, 51 Mich. L. Rev. 375 (1953).

[9] See note 5 supra.

[10] Clayton v. Hallet, 30 Colo. 31, 70 Pac. 429, 434 (1902).

[11] Comment, 48 Harv. L. Rev. 1162 (1934-5) citing Zollman, Charities §§ 120-21 (1924).

Although the two powers were exercised by the same Court, it is necessary to note the circumstances under which the cy pres powers were exercised, and equally as important, which particular power was being exercised. In England, the judical power was exercised in cases involving: (1) an absolute gift to a charitable organization;[16] and, (2) a charitable trust.[17] Under the second division, the following situations were handled: Immediate failure or impracticability of the testator's named object;[18] the subsequent failure of the testator's object;[19] immediate surplus where the testator's named object is unable to absorb the surplus;[20] and where there is a subsequent surplus arising from the diminution of objects or from an increase in the funds.[21] At one time there was a conflict as to whether a gift to a trustee with discretion to distribute it to charity in general was to be administered under the judicial or prerogative power. The conflict was resolved in favor of the judicial power.[22]

The prerogative power was exercised in the following situations:[23] (1) a gift for charity which does not involve a trust; (2) an absolute gift to a charitable society; and, (3) gifts for an illegal purpose, such as the promotion of a forbidden religion. It was the abusive exercise of the prerogative power, which ignored the intent of the donor-testator, that brought about the vast majority of criticism directed at the doctrine.[24] The most infamous example of the abusive exercise of the

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[12] Bogert, Trusts and Trustees § 432 (1953).
[13] Bogert, op. cit. supra note 12.
[14] Comment, op. cit. supra note 11.
[15] Note, 13 Cornell L. Q. 310, 312 (1927-8).
[16] Bogert, Trusts and Trustees § 432 (1953).
[17] Bogert, op. cit. supra note 16.
[18] Biscoe v. Jackson, 35 Ch. D. 461 (1187).
[19] Re Slevin, 2 Ch. 236 (1891).
[20] Re Joyce, Ch. 514 (1940).
[21] Re Campden Charities, 13 Ch. 310 (1881).
[22] Moggridge v. Thackwell, 7 Ves. 36 (1802).
[23] Bogert, Trusts and Trustees § 432 (1953).
[24] Comment, 49 Yale L. J. 303 (1939-40).

Sign Manual is found in *Da Costa v. De Pas,*[25] which involved a gift for an illegal purpose. A Jewish testator left money in trust to apply the income for the establishment of a jesuba, an assembly for instruction in the *Jewish* religion. At the time of the bequest, the Jewish religion was forbidden as being contrary to the established religion. Therefore, the King, under the Sign Manual, directed the income from the trust fund to be applied to the support of a *Christian* preacher in a foundling hospital. Although the injustice of the decision was readily apparent, it was reluctantly followed in subsequent English cases.[26]

This was the cy pres doctrine when it came to America: a doctrine originally of two parts which had been erroneously merged into one due to the vesting of the two powers in one judicial officer. The confusion and abuse of the cy pres powers was the ground upon which the American Courts had to build.

II. OPERATION AND SCOPE OF CY PRES

It is a principle of Trust law that if for some reason a trust fails and there is no provision for a subsequent disposal, the res goes to the settlor or his heirs at law by way of resulting trust.[27] The use of cy pres is one means by which courts can prevent the failure of charitable trusts. In America, the doctrine of cy pres is a rule of construction in which the intention of the donor is controlling.[28] This is in accord with the English view of the judicial cy pres and is in direct opposition to the prerogative power. The *Restatement of Trusts*[29] describes the nature and operation of cy pres as follows:

> "If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor."

Cy pres requires the presence of a valid charitable gift for its operation.[30] That is to say, the doctrine of cy pres is peculiar to charitable trusts and charitable organizations. There are two requisite elements to the operation of cy pres: ". . . when the Court can see in the instrument a general charitable purpose as well as a specific gift, and when the specific gift fails . . . ."[31] The first to consider is the failure of the specific gift. It must be noted that although the specific gift may have failed, if the donor-testator has provided for disposition upon failure of the gift, then cy pres does not apply,[32] the doctrine being applicable only when there is a failure with no provision for the subsequent disposal of the property.

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[25] 1 Amb. 228, 2 Swarst. 487 (1754).

[26] Attorney-General v. Downing, Wilm. 1, 32, Amb. 549 (1767).

[27] Lusk v. Lewis, 32 Miss. 297 (1856).

[28] Note, 17 B.U.L. Rev. 763, 765 (1937).

[29] Restatement, Trusts § 399 (1935).

[30] Smith v. Ahern, 52 R. I. 346, 161 Atl. 117 (1932).

[31] Allen v. Nasson Inst., 197 Me. 120, 77 Atl. 638 (1910).

[32] Mississippi Children's Home Society v. City of Jackson, 93 So.2d 483 (Miss. 1957).

The element which usually determines the applicability of cy pres to a particular situation is general charitable intent, the crucial question being—was the specific charitable object which failed merely a mode for carrying out the general intention of the testator or was it the only charity the testator intended to benefit?

> "If you see a general intention of benefiting a certain class or number of people, who come within the ordinary definition of objects of charity, and you find that the particular mode the testator has contemplated of doing this cannot be carried out, and you are convinced that the mode is not so essential that you cannot separate the charity from that particular mode, then the court says there is a general intention of charity . . . ."[33]

The origin of the requirement of a general charitable intention is the English case of *A-G v. Boultbee,*[34] in which it was held that if the intention could not be executed literally, then as far as is consistent with the general intention of the donor, cy pres could be applied and the mode of execution changed. The requirement of a general charitable intention has been criticized by an eminent authority[35] for the following reasons: (1) some courts believe that they are carrying out an actual secondary intent of the settlor;[36] and, (2) others decide their cases on the assumption that the settlor actually considered the subsequent disposal of the res if the object of the first trust failed.[37] However, this criticism is directed at an element of the doctrine and is not an attack upon the doctrine as a whole. It is suggested that courts should disregard the fictional test of charitable intent and base their decisions on public policy considerations.

Generally speaking, "to justify a court in applying cy pres . . . there must be a situation in which the application of the fund as intended by the donor is impossible, impractical, or inexpedient . . . ."[38] A limitless variety of situations may be found for the application of cy pres,[39] but attention is now directed to those situations which most frequently occur and are easily classified. First, consider a case where the trust fund was inadequate to perform the act specified by the testator. A testator, expressly disinheriting his heirs, gave land to his lodge for an orphan home site,[40] The remainder of the property was given to the lodge for the establishment of a sanitarium for the treatment of disease by methods prescribed by testator in his will. It was found that the funds of the trust were insufficient to carry out the projects of the testator. Upon finding a general charitable intent, the

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[33] State v. Federal Square Corporation, 89 N.H. 538, 3 A.2d 109 (1938) quoting from Biscoe v. Jackson, 35 Ch. Div. 460, 463 (1187).

[34] 2 Ves. Jun. 379 (1794), *aff'd* 3 Ves. Jun. 220.

[35] Bogert, Trusts and Trustees § 436 (1953).

[36] Bruce v. Maxwell, 311 Ill. 479, 143 N.E. 82 (1924).

[37] Trustees of Adams Female Academy v. Adams, 65 N. H. 225, 18 Atl. 777 (1890).

[38] Bogert, Trusts and Trustees § 438 (1953).

[39] Bogert, Trusts and Trustees § 439 (1953).

[40] Mac Carroll v. Grand Lodge, 154 Ark. 376, 243 S. W. 870 (1922).

Court held that the property could be sold and the proceeds applied to the support of a home for widows and orphans which the lodge already maintained. A second situation involves an absolute gift to a charitable organization which cannot be identified. Testatrix directed a remainder interest to be paid to "the charitable institution for crippled children . . . more particularly designated as ________________."[41] The Court awarded the remainder to a hospital with which the testatrix was familiar; that, in the Court's opinion, met all requirements of the testatrix. Third, consider an absolute gift to a chartiable organization which never existed or ceased to exist before the gift was made. Testatrix left several bequests to charitable organizations one of which was incorporated but dormant at date of execution of the will.[42] One year prior to testatrix's death, the corporation forfeited its charter. The Court found a general charitable intent and directed the gift to be applied cy pres, thereby preventing the lapse of the gift. Fourth, is a gift that contains an illegal element. Testator left a bequest to a charitable organization far in excess of the amount the organization was, by law, allowed to hold.[43] Upon finding that the particular charitable organization was an instrument for carrying out the general charitable intent of the testator, the Court stated that they would appoint a trustee to act in place of the corporation in the management of the excess amount. The fifth situation involves gifts where discretion is given to a trustee who cannot perform. Testatrix directed named executors to distribute the residue of her estate "to such charities that he or they may feel that I would be interested in."[44] Before the distribution was completed, all named executors had died. The Court held that the residue would be distributed under the Court's supervision.

III. AMERICAN ATTITUDE

A. *Statistically*

From the founding of this country to the time of the Civil War, the judicial attitude was one of hostility to cy pres and to charitable trusts in general. As of 1860, 15 states had considered the doctrine. Of these, Alabama, Connecticut, Georgia, Iowa, New York, North Carolina, Pennsylvania, South Carolina, Tennessee and Virginia repudiated the doctrine.[45] It was approved[46] in Indiana, Illinois, Kentucky, New Hampshire and Massachusetts. By 1860 Pennsylvania, having originally repudiated the doctrine, enacted the first American statute approving the doctrine.[47]

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[41] Note, 23 Temp. L. Q. 159 (1949-50).

[42] Rhode Island Hospital Trust Company v. Williams, 50 R. I. 385, 148 Atl. 189, 74 A.L.R. 664 (1929).

[43] Hubbard v. Worchester Art Museum, 194 Mass. 280, 80 N.E. 490 (1907).

[44] Levin v. Attorney-General, 136 N.J. Eq. 568, 42 A.2d 870 (1945).

[45] Carter v. Balfour's Administrator, 19 Ala. 814, 830 (1851); White v. Fisk, 22 Conn. 31, 54 (1852); Beall v. Drane, 25 Ga. 430, 442 (1858); Miller v. Cittenden, 2 Iowa 315, 369 (1856); Beckman v. Bonsor, 23 N.Y. 298, 310 (1861); Lemmond v. Peoples, 41 N.C. 107 (1848); Methodist Church v. Remington, 1 W. 219 (Pa. 1832); Attorney General v. Jolly, 26 S.C. 379 (1848); Green v. Allen, 24 Tenn. 162, 232 (1844); Gallego's Ex'trs. v. Attorney General, 3 Leigh 450, 473 (Va. 1832).

[46] Sweeny v. Sampson, 7 Ind. 465, 477 (1854); Gilman v. Hamilton, 16 Ill. 225, 231 (1854); Curling's Administrators v. Curling's Heirs, 38 Ky. 38 (1839); Second Congregational Society v. First Congregational Society, 14 N.H. 315, 330 (1843); American Academy of Arts and Sciences v. President of Harvard College, 78 Mass. 582 (1832).

After 1860 Delaware[48] and the District of Columbia[49] disapproved the doctrine, while Kentucky reversed its stand and disapproved the doctrine.[50] Alabama, Connecticut, Delaware and Indiana have reversed their original stand and have approved the doctrine,[51] while Kentucky has allowed its use in certain instances.[52] Alabama, Georgia, New York and Virginia have changed from disapproval to approval by way of statutory enactments.[53] Louisiana, Maryland, Minnesota, Rhode Island, South Dakota, Vermont, West Virginia, Wisconsin, California and Texas have also enacted statutes approving and regulating the use of the doctrine.[54] Indiana, Maine and Massachusetts have statutes regulating the use of cy pres in certain instances.[55] As of the present, Arizona, by way of dictum, and North Carolina, South Carolina, Tennessee, the District of Columbia and Mississippi refuse to recognize the doctrine as part of their jurisprudence.[56]

B. *Reasons For Opposition*

A survey of the cases shows that opposition to cy pres falls into one of four well-defined categories. First are those cases which confuse the relationship between the statute of 43 *Elizabeth* c. 4 and the cy pres power. American Courts were confused as to whether equity's power over charitable trusts stemmed from the Common Law or from the statute of Elizabeth. The United States Supreme Court held that power over charitable trusts came from the statute,[57] but in a later decision[58] changed their opinion and held that the equitable power over charitable trusts stemmed from the Common Law. The correct view seems to be that equity's power over charitable trusts came from immemorial usage prior to the enactment of the statute of Elizabeth.[59] However, this early confusion continued to exist to some degree and many states continued to hold that the statute of Elizabeth, which was not in effect in their states, was the source of equity's jurisdiction over charitable trusts and the auxiliary doctrine of cy pres.[60]

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[47] Pa. Pub. Law 328 § 10 (1855).

[48] Doughten v. Vandever, 5 Del. Ch. 51 (1875).

[49] Graff v. Wallace, 59 App. D.C. 64, 32 F.2d 960 (D. C. Cir. 1929), *cert. denied,* 280 U.S. 579 (1929).

[50] State Bank & Trust Co. v. Patridge, 198 Ky. 403, 248 S.W. 1056 (1923).

[51] Tumlin v. Troy Bank & Trust Co., 258 Ala. 238, 61 So.2d 817 (1950); Hoyt v. Bliss, 93 Conn. 344, 105 Atl. 699 (1919); Union Methodist Episcopal Church v. Equitable Trust Co., 32 D. Ch. 197, 83 A.2d 111 (1951); Richards v. Wilson, 185 Ind. 335, 112 N.E. 780 (1916).

[52] When testator's methods are impractical or impossible and not when object of trust fails or ceases to exist. Citizens Fidelity Bank & Trust Co. v. Bernheim Foundation, 305 Ky. 802, 205 S.W.2d 1003 (1947).

[53] Ala. Code tit. 47, § 145 (1940); Ga. Code Ann. §§ 108-202, 113-815 (1948); N. Y. Personal Property Law § 12(2); N.Y. Real Property Law § 113(2) (1941); Va. Code § 55-31 (1950).

[54] La. Laws c. 592 (1954); Md. Code Ann. art. 16, § 295 (1957); Minn. Stats. Ann. § 501.12 (1945); R. I. Gen. Laws c. 487, § 1 (1938); S. Dak. Laws c. 429, p. 505 (1955); Vt. Stats. §1282 (1947); W. Va. Code § 3502 (1955); Wisc. Stats. §§ 231.11(7), 323.025 (1957); Cal. Probate Code § 101 (1954); Vernon's Tex. Civ. Stats. Ann. art. 2595 (1925).

[55] Ind. Stats. Ann. §§ 26-631 (1948) - (general donations); Me. Rev. Stats. c. 57, §§ 33-34 (1954)-(pious purposes); Mass. Laws Ann. c. 214, § 3(11)-(municipalities); Mass. Laws Ann. c. 214, § 3(12) (1932)-(religious societies).

[56] Hawyard's Estate, 65 Ariz. 228, 178 P.2d 547 (1947) (dictum); Woodcock v. Wachovia Bank & Trust Co., 214 N.C. 828, 199 S.E. 20 (1938); Mars v. Gibert, 93 S.C. 455, 77 S.E. 131 (1913); Henshaw v. Flenniken, 183 Tenn. 232, 191 S.W.2d 541 (1946); Graff v. Wallace, 59 App. D.C. 64, 32 F.2d 960 (D.C. Cir. 1929), *cert. denied,* 280 U.S. 579 (1929); National Bank of Greece v. Savarika, 167 Miss. 571, 148 So. 649 (1933).

[57] Trustees of Philadelphia Baptist Associations v. Hart's Executors, 17 U.S. 1 (1819).

A second group of cases confused the judicial power with the prerogative power. Due to the previously mentioned practice of allowing the English Chancellor to exercise both powers, the line of demarcation between the two became blurred by a line of confusing cases. It was recognized at an early stage in our history that the prerogative power did not exist in the United States.[61] Although a few enlightened courts recognized that "... the power, apart from the prerogative power, is a regular chancery power . . . ,"[62] many courts, relying on English cases which had blurred the line of separation between the two, held that "the cy pres rule was an English rule, and formerly resorted to as an exercise of the prerogative power . . . ."[63]

A third group of cases rejected cy pres as being a rule of arbitrary disposition giving Chancellors power to remake deeds and wills according to their own social or religious views.[64] These cases also failed to see the distinction between the judicial and prerogative powers, that is, that it was the prerogative power, not the judicial power, which was guilty of arbitrary disposition without regard to the settlor's intentions. These Courts were greatly influenced by the abusive use of the prerogative power in cases such as *De Costa v. De Pas*.[65] It is believed that the criticism of the Courts was directed to the religious persecution practiced in England rather than to the cy pres power.[66]

A fourth group of cases base their rejection of the doctrine on the belief that the power is unsuited to our democratic institutions.[67] Undoubtedly these decisions were influenced by the philosophies of Montesquieu, Locke and Blackstone. The cy pres power was thought not only to be in conflict with our theory of separation of powers, but it was believed to be undemocratic in that it violated the natural right of man, particularly his right of property.[68] These cases favored the "dead hand" of the donor-testator to the exclusion of the public welfare. It is to this group of cases that Mississippi pledges its allegiance. The general attitude of this group is found in the expression:

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[58] Gerard v. Gerard, 43 U.S. 127 (1844).

[59] Clayton v. Hallett, 30 Colo. 31, 70 Pac. 429 (1902).

[60] Scott, Trusts § 348.3 (2d ed. 1956).

[61] Perin v. Carey, 24 U.S. 465 (1861).

[62] Pell v. Mercer, 14 R.I. 412, 436 (1844).

[63] Bruce v. Maxwell, 311 Ill. 479, 143 N.E. 82 (1924).

[64] Bogert, Trusts and Trustees § 433 (1953).

[65] 1 Amb. 228, 2 Swarst. 487 (1754).

[66] Comment, 49 Yale L. J. 303 (1939-40).

[67] Grimes Ex'trs v. Harmon, 35 Ind. 198, 9 Am. Rep. 690 (1871); National Bank of Greece v. Savarika, 167 Miss. 571, 148 So. 649 (1933).

[68] Fisch, The Cy Pres Doctrine and Changing Philosophies, 51 Mich. L. Rev. 375 (1953).

> "No public benefit, no increased beneficence, no advantage to religious activity, can justify a court in making over the wills . . . of men, in the conviction that changed conditions make this, if not necessary, at least highly desirable."[69]

In recent years, the trend has been toward the acceptance of cy pres either by case decision or statutory enactment. One cause is the re-examination of the source and nature of the doctrine. Many courts in their zeal to denounce the prerogative power had also erroneously denounced the judicial power. Upon re-examination, these courts found that the cy pres power, as correctly understood, encompassed two powers and that it was the prerogative power that was foreign to the democratic society of America. These courts were quick to admit that it was the prerogative power and not the judicial power that had been repudiated in their jurisdictions.[70]

The possible major cause for the trend is the change in legal philosophy in the United States. Pre-1900 thinking emphasized the position of the individual, but the advent of the twentieth century found a definite change in the public attitude. Due largely to the legal philosophy of Pound[71] in which he denounced exaggerated respect for the rights of the individual and preached the good of the society, many courts began considering the public as the ultimate beneficiary of a charitable trust. In so doing, the courts found that the cy pres doctrine was in keeping with the modern legal philosophy expounded by Pound.

> ". . . these rich men should be remembered with honor who devote some part of their estate to widen opportunity and enjoyment for the public. In death, as in life, those who have accumulated large estates should have regard 'for the spears of Judah and the archers of Benjamin'—that solid mass of men who have lived in poverty or struggled through life on small means, yet whose law-abiding spirit has protected the property of those who have made large accumulations of wealth, in safety and untroubled by the spoiler."[72]

The emphasis on the good of the society has not yet become the prevailing theory for there still exists the conflict between the "dead hand" theory, on the one side, whereby the words of the will or the trust instrument are solemn mandates for the guidance of the court; and, on the other side, the consideration of the public welfare, "the importance of the welfare of the beneficiaries which may not be advanced by the donor's provisions, the fact that in time machinery set up by the donor is outgrown."[73] That the present trend is away from the "dead hand" doctrine is shown in the fact that ". . . the courts of today, believing that the public good is served by a liberal enforcement of the purpose of the donor, apply the cy pres doctrine whenever possible and support charitable trusts to the limits of the doctrine."[74]

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[69] First Congregational Society v. City of Bridgeport, 99 Conn. 22, 37, 121 Atl. 77 (1923).

[70] Tumlin v. Troy Bank & Trust Co., 258 Ala. 238, 61 So.2d 817 (1950); Delaware Trust Company v. Graham, 30 D. Ch. 330, 61 A.2d 110 (1948).

[71] Pound, Spirit of the Common Law, 18 The Green Bag 17 (1906).

[72] Wachovia Bank & Trust Co. v. Ogburn, 181 N.C. 331, 107 S. E. 238 (1921).

[73] Bradway, Tendencies in the Application of the Cy-Pres Doctrine, 5 Temp. L. Q. 489 (1930-31).

IV. CONCLUSION

In *National Bank of Greece v. Savarika*,[75] a testator devised money to a bank in Athens, Greece, in trust—the interest thereon to be paid to the trustee of a school for girls at Bougasticon, Macedonia, Greece. There was no school for girls at Bougasticon, and the territory including it had been ceded by Greece to Turkey. The Mississippi Court held that since no beneficiary described in the trust instrument was in existence, the trust failed. The Court refused to uphold the trust because ". . . It would have to be applied through the vague, voluntary, and arbitrary mode of cy pres, or the act of Elizabeth . . . ."[76] In this case, and in a later case,[77] the Court recognized a distinction between the doctrine of cy pres and the equitable doctrine of approximation. The distinction between approximation, which allows deviations from the terms of the trust, and cy pres, which allows the substitution of objects of charity as long as the substituted object is within the scope of the general charitable intent of the testator, is, at best, hazy and indefinite. This is evidenced by the fact that some courts hold that cy pres in the United States is the equitable doctrine of approximation,[78] while others use the approximation theory to reach the results that would be reached by a use of cy pres.[79]

The immediate problems in Mississippi are: (1) to determine whether this state adheres to the equitable doctrine of approximation; and, (2) if the doctrine of approximation is followed in Mississippi, a good workable distinction between cy pres and approximation should be drawn. It is indicated by the cases that equitable approximation is recognized in Mississippi, but as yet, the Court has not taken an affirmative stand on this question. Assuming that the approximation doctrine is in force in Mississippi, it is submitted that no principle by which one can determine the outer limits of approximation and the beginning of cy pres has been stated by the Court. Even if such a guiding principle were formulated, it is believed that, at best, this would be but a temporary solution to the problem.

The use of the charitable trust is ever increasing in our modern society and the tendency in the field of charitable trusts is toward increasing control by the courts.[80] It is submitted that cy pres is a necessary ingredient to the success of the charitable trust, and a continuing refusal to recognize this doctrine will eventually lead to the destruction of the charitable trust in Mississippi. This result can be prevented by a repudiation of Mississippi's present stand on the doctrine. Two avenues are available—court action or legislative action.

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[74] Fisch, supra note 68 at 388.

[75] 167 Miss. 571, 148 So. 649 (1933).

[76] Ibid. at 655.

[77] Mississippi Children's Home Society v. City of Jackson, 93 So.2d 483 (Miss. 1957).

[78] Doyle v. Whalen, 87 Me. 414, 32 Atl. 1022 (1895).

[79] Note, 39 Colum. L. Rev. 1358 (1939). See also Annot., 169 A.L.R. 266, 268 (1947).

[80] Bradway, supra note 73 at 489.

If legislative action is considered, insight can be gained from a study of the statutes enacted in other jurisdictions.[81] The following statute, enacted in Maryland and Vermont,[82] is submitted as containing a general statement of the doctrine as it is understood in the United States.

> "If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment, or if a devise or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor, or testator, manifested a general intention to devote the property to a charity, (a court of equity) may, on application of any trustee, or any interested party or the attorney general of the state, order an administration of the trust, devise or bequest as nearly as possible to fulfill the general charitable intention of the settlor or testator."[83]

If Court action is taken, the historical background of the doctrine should be ignored as much as possible for the old cases are couched in confusing and antiquated terminology. A workable doctrine should be based upon a re-evaluation of the conflicting philosophies of law, and there should be a compromise struck between the interests of the individual and the interests of society.

Harold D. Miller, Jr.

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[81] See notes 53, 54 and 55 supra.

[82] Md. Code Ann. art. 16, § 295 (1957); Vt. Stats. § 1282 (1947).

[83] The Model Act concerning the administration of Charitable Trusts, Devises and Bequests, recommended by The National Conference of Commissioners on Uniform State Laws (1940) cited in Scott, Trusts § 399 (2d ed. 1956).

WORKMEN'S COMPENSATION-APPORTIONMENT OF SUCCESSIVE INJURIES—MISSISSIPPI'S NEW APPORTIONMENT ACT

I. Introduction

On January 1, 1959, an important modification to the Workmen's Compensation Law of Mississippi took effect,[1] i.e., the Apportionment Act passed in 1958. The purpose of this comment is twofold: first, to show broadly how the legislatures and judicial bodies of the other States have dealt with the problem of working out an equitable result between the employer and his employee who had a previous impairment which was aggravated by the subsequent industrial accident, and, second, to illustrate the effectiveness of the apportionment law in Mississippi in the future.

II. General Explanation

A. *Historical Significance*

The purpose of the Workmen's Compensation Act was to aid the working man, who, hampered by economic forces and harsh common law rules, had a slim chance of recovery from the majority of industrial accidents.[2] In turn, society has been relieved somewhat of the burden of caring for such unfortunate employees and their dependents. In short, the ideal situation would be where the Workmen's Compensation Act provided an equitable result for all concerned.

However, such was not the result. Many states followed the Massachusetts rule[3] whereby the last employer had to pay for the end result regardless of the nature of the injured employee's disability prior to his industrial injury. The courts which followed this unfair rule echoed these familiar words: "The employer takes the employee with all his existing disabilities and weaknesses and such employee is entitled to compensation for injury arising out of his employment irrespective of the fact such injury is more severe by reason of his pre-existing condition or defect."[4] Thus, a rule such as this meant that employers would be reluctant to hire handicapped workers and would be strongly motivated in releasing those handicapped workers already employed. As Larson[5] points out, thirty days following the non-apportionment rule in *Nease v. Huges Stone Co.,*[6] between seven and eight thousand handicapped workers were displaced in Oklahoma.

There were states,[7] which on the other hand, while adhering to the Massachusetts rule, modified it so that it became difficult for the employee to recover at all. Their answer was the unusual exertion doctrine. This rule required that such employees suffering from a pre-existing condition must, at the time of the industrial accident, have caused greater exertion than that ordinarily incident to employment.[8] In Oklahoma, before the employee with a pre-existing condition can be compensated, he must show that the second injury was not a mere recurrence of the first, but that the second accident was due to an independent and intervening cause. Thus, in *Hall v. Howard Johnson of Oklahoma,*[9] it was held that a second injury of the employee's back was a mere recurrence of the previous injury, and compensation was denied.

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[1] House Bill 610, which amends Sec. 4 of M.W.C.A.

[2] Dunn, Mississippi Workmen's Compensation, § 2 (1957). For a full explanation see Horowitz, Injury and Death Under Workmen's Compensation Laws, pp. 1-10 (1944).

[3] Blanco's Case, 308 Mass. 574, 33 N.E.2d 313 (1941); See Walsh v. Kotler, 46 N. J. Super. 425, 134 A.2d 458 (1958), the N. J. court rejected the deputy director's attempt to apportion claimant's pre-existing condition and held the employer for the total amount; Martin v. Snuffy's Steak House, 46 N. J. Super 425, 134 A.2d 789 (1957); Marsolek v. Miller Waste Mills, 244 Minn. 55, 69 N.W.2d 617 (1955).

[4] Martin v. Snuffy's Steak House, supra note 3.

[5] 2 Larson, The Law of Workmen's Compensation, § 59.32 (1952).

[6] 114 Okla. 170, 244 Pac. 778 (1926).

[7] 1 Larson, The Law of Workmen's Compensation, § 38.64 (1952).

B. *Present Trends*

Today, the Massachusetts rule and the unusual exertion rule are the minority rules, for the majority of the states have passed some type of apportionment law. Perhaps the most popular of these has been the *second injury fund statutes.*[10] Under these statutes a special fund is created for the sole purpose of paying that part of the second injury which was increased due to the prior defect. The employer pays the other portion. Since it is difficult to generalize as to how these statutes work, the best approach seems to be to discuss the two following cases which illustrate this point.

In *Hamilton Engineering Co. v. Industrial Commission,*[11] prior to the industrial accident the claimant had received X-ray treatments for neural dermatatis. These treatments caused his vision to grow continuously worse until he had to wear glasses. Finally, he had a cataract removed from his left eye. His right eye was damaged during the accident. The Illinois Court held that it was error for the lower court not to deduct the previous loss of the left eye, and also held, concerning the right eye, that the employer should pay for the part attributed to the last injury and the State Treasurer should pay the balance out of the special fund.

In *Fronzen v. Blakely*[12] the plaintiff had fractured her right wrist in an automobile accident. In 1948 she fell and broke her left wrist while working as a waitress. She sought compensation for *both* hands. The Nebraska Supreme Court held that plaintiff had a permanent disability as a result of the accident and was entitled to compensation. The employer was liable for the second injury, and the second injury fund was to compensate for the additional disability caused by the pre-existing condition.

Next, there are the states which have apportionment statutes.[13] While these statutes differ in many respects, they are alike in one central theme. The last employer pays only that portion of the injury not attributed to the employee's pre-existing condition. No one pays for the prior defect unless it was a prior compensable injury.[14] The rule in New Hampshire is to apportion successive compensable injuries between successive employers.[15] Each employer pays his respective share for the second injury. Thus, the responsibility of the first employer continues as to future disabilities.

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[8] Gattula v. Standard Reliance Ins. Co., 165 Neb. 1, 84 N.W.2d 179 (1957); Rosso v. Aetna Steel Products Corp., 174 Pa. Super. 258, 101 A.2d 392 (1953); Schroeder v. Arthur Sales Co., 5 N. J. Super. 287, 68 A.2d 878 (App. Div. 1949); see also 15 U. Pitt. L. Rev. 655 (1954).

[9] 297 P.2d 560 (Okla. 1956).

[10] See 44 Mich L. Rev. 162 (1949).

[11] 339 Ill. 30, 76 N.E.2d 506 (1947).

[12] 155 Neb. 621, 52 N.W.2d 833 (1952).

[13] States which have apportionment laws are California, Florida, Indiana, Kentucky, Maryland and North Dakota.

The apportionment rule is not perfect, chiefly for two reasons. Unlike the second injury fund statutes, the employee is not compensated for that amount due to the aggravation of his pre-existing condition. Thus, handicapped workers will receive less compensation in apportionment states than in second injury fund states. Another imperfection is shown in an example where a worker loses part of his leg while working for a high wage and then later loses the rest of that leg while working for a lower wage, which he was receiving as a result of his prior defect. It is readily seen that under the apportionment rule, if the compensation is based on the wage at the time of each injury, then the worker will receive less for both injures than he would if his leg had been completely severed in one accident. The worker has lost even more when his additional pain and suffering are considered.[16]

Of course, this last imperfection may work to the employee's advantage as it did in *Fuytinck v. Burton W. Duenke Building Co.*[17] In that case the claimant had two successive back injuries. There had been a compromise settlement for the prior injury, and the wages received at the time of the second injury were higher. The Missouri court held that use of the higher wage for the wage basis was proper since the wage of the claimant at the time of the second injury is the proper basis for figuring the claimant's compensation for that injury.

The mechanics of the apportionment rule are relatively simple, as illustrated by the case of *Dunn v. Hartford Accident & Indemnity Co.*[18] In this case the claimant, prior to the second injury, had lost only 4.3 per cent of his vision. His percentage loss after the second injury was 96.7 per cent of his eyesight. The Georgia court held that the Board of Workmen's Compensation should first determine the total disability found to exist after the last injury, determine the disability found after the earlier injury, and subtract the latter from the former. Therefore, the claimant got 92.4 per cent attributable to his last injury.

It appears that the difficult part is determining what portion of the injury is caused by the pre-existing defect. In *City of Glendale v. Industrial Accident Commission,*[19] Justice Fox aptly stated:

> "The difficulty of making an apportionment does not relieve the Commission of the duty imposed on it by statute. Making an apportionment is no more speculative or difficult than determining

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[14] 6 S.C.L.Q. 481 (1954).

[15] Dunbar Fuel Co. v. Cassidy, 100 N. H. 397, 128 A.2d 904 (1957); Minnesota allows apportionment between insurers. See 40 Minn. L. Rev. 93 (1955).

[16] Hopper v. Firestone Stores, 222 S. C. 143, 72 S.E. 71 (1952); 6 S.C.L.Q. 480 (1954).

[17] 280 S.W.2d 449 (Mo. 1955).

[18] 81 Ga. App. 283, 58 S.E.2d 245 (1950).

[19] 153 Cal. App. 213, 314 P.2d 182 (1957).

> the extent and duration of a physical injury and awarding compensation therefor. 'It is a thing that courts and juries do every day in personal injury actions . . . . The Commission and its referees should be deemed no less competent to perform this task than is the ordinary jury . . . .' To require the employer to assume the entire financial burden of the applicant's disability simply because it is difficult to make an apportionment between the occupational and non-occupational causes would not only be contrary to the mandate of the Legislature but also unfair and inequitable to the employer."

III. The Situation in Mississippi

In Mississippi on the eve of the date the Apportionment Act was to take effect, the case of *L. B. Priester* & *Son v. McGee*[20] was handed down. This decision illustrates the striking need for such a law and the harshness of the previous rule. In this case the employee had sustained a heart attack in 1952 and had received compensation. He carried with him a severe arterios-clerotic disease when he was employed in 1956. He was not asked nor did he tell his employer of this pre-existing condition. In the fifth week of his employment, he suffered a severe coronary occulsion with infraction. The Supreme Court of Mississippi held that the injury was compensable and the last employer was responsible.

In *East v. Pigford Bros. Co.*,[21] the claimant had been operated on for hemorrhoids when eight years old and had been bothered again with hemorrhoids while a soldier in the second World War. In 1951 while cranking a gasoline motor, his hemorrhoid protruded with great pain, thus resulting in his disability. He had told his superintendent of this condition from which he had suffered while in the army. The Mississippi Supreme Court stated that:

> "The strain in cranking the motor evidently lighted up, aggravated and accelerated East's pre-existing but dormant hemorrhoids, and combined with such infirmity to produce the disability for which compensation is here sought."

Then quoting Larson the Court stated:

> "Pre-existing disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought."

From the *McGee* and *East* cases it is seen that prior to the Apportionment Act, Mississippi had adopted the Massachusetts rule with none of its modifications.[22] In Mississippi where there is added virtually unlimited medical aid, an employer who has employed a worker with a prior defect would find himself taking a substantial risk financially.[23]

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[20] 106 So.2d 394 (Miss. 1958).

[21] 219 Miss. 121, 68 So.2d 294 (1953).

[22] Other Mississippi cases are the following: pre-existing heart disease, Lewis v. Trackside Gasoline Station & Pac. Ind. Co., 103 So.2d 868 (Miss. 1958); pre-existing hypertension, Insurance Department of Mississippi v. Dinsmore, 102 So.2d 691 (Miss. 1958); weakness from prior operation, King v. Westinghouse Corp., 92 So.2d 209 (Miss. 1957); gall bladder trouble, chronic bronchitis, and a chronic heart disease,

From the Apportionment Act[24] the broad coverage of "a pre-existing physical handicap, disease or lesion" is limited to apportionment only if the employer had required a pre-employment physical examination and that examinaton disclosed a pre-existing permanent physical impairment. Indiana has a statute similar in that it also requires the injury to be a prior permanent one which is aggravated or increased by subsequent injury before there is apportionment. In looking to the purpose of such an amendment, the Indiana court, in *Kinzie v. General Tire and Rubber Co.*,[25] stated:

> "It seems obvious that the purpose of the amendment was to remove one of the major barriers against the employment of the physically handicapped persons by dealing more fairly with the employer of such persons. From common sense we know that afflicted members of the body are generally not only less productive than members which are whole, but that such afflicted members are also more susceptible to subsequent injury."

Mississippi adds to the rule requiring the previous impairment to be permanent, by requiring the employer to have discovered this defect through a pre-employment physical examination. In this requirement Mississippi stands alone. The only state which has a similar requirement is New York,[26] a "special disability fund" state. There the employer must have knowledge of the employee's pre-existing condition before he can recover for compensation payments paid after a period of 104 weeks of disability. Thus, in comparison, both Mississippi and New York require that, before there can be apportionment, the employer must have known of the employee's handicap. Mississippi's requirement differs in that the employer's knowledge of such defect can only be attained through a pre-employment physical examination.

Schilling v. Miss. State Forestry Commission, 226 Miss. 858, 85 So.2d 562 (1956); hypertensive cardiovascular disease, W. G. Avery Body Co. v. Hall, 224 Miss. 51, 79 So.2d 453 (1955); high blood pressure, Cowart v. Pearl River Tung Co., 218 Miss. 340, 67 So.2d 356 (1953); pre-existing mal-formation of blood vessels, Ingalls Shipbuilding Corp. v. Byrd, 215 Miss. 234, 60 So.2d 645 (1952).

[23] "The employer is required to furnish medical services, supplies and care . . . . There is no limit beyond what is reasonably required, either in dollar amount or duration of time . . . ." Dunn, Workmen's Compensation, § 27 (1957).

[24] House Bill 610 reads as follows: "Compensation shall be payable for disability or death of an employee from injury arising out of and in the course of employment, without regard to fault as to the cause of the injury, subject to the following:

"Where a pre-existing physical handicap, disease or lesion is aggravated, accelerated or adversely affected by accidental injury, or is in any manner a material contributing factor in the results following accidental injury, the compensation which, but for this paragraph, would be payable shall be reduced by that proportion which such pre-existing physical handicap, disease or lesion contributed to the production of the results following the accidental injury. Provided, however, this section shall only apply in those cases wherein the employer, in advance of any subsequent injury, has required a pre-employment physical examination, and such examination has disclosed a pre-existing permanent physical impairment, based on satisfactory medical evidence of such impairment, and such pre-existing physical handicap disclosed was materially aggravated by the subsequent injury."

[25] 235 Ind. 592, 134 N.E.2d 212 (1956).

[26] Zyea v. A. D. Julliard & Co., Inc., 277 App. Div. 604, 102 N.Y.S.2d 255 (1951).

As already stated, the coverage by the Act of a "pre-existing handicap, disease or lesion" is broad. California and Maryland also have broad coverages. California's law differs since it provides that in cases dealing with occupational diseases, the employee may, at his option, obtain an award from any of the successive employers. The selected employer can then obtain apportionment from the other employers.[27] The Maryland Court recently held, in *Bethlehem Steel Co. v. Munday*,[28] that it was error to restrict apportionment to a pre-existing disease or infirmity which had actually disabled to the extent of causing loss of work prior to the accident. Kentucky, one of the original states to adopt an apportionment law, amended its statute in 1948 so as not to include prior diseases except those resulting from a compensable injury. Mississippi, it would appear, will probably follow the result in the *Munday* case and leave no restriction as to what type of cases "disease" will apply.

It is submitted that under this broad coverage of the Act, even age of the employee might be a basis of apportionment. Senility caused by age is a permanent defect. In Arizona where age is specifically listed as a condition to be considered in apportioning the disability, the Supreme Court held in *Eagle Indemnity Co. v. Hadley*[29] that age must have amounted to a pre-existing disability in order for there to be any apportionment.

As for a disease which has lain dormant and would not have manifested itself but for the type work the employee performed, it is questionable whether or not it will be apportioned. The answer in Mississippi appears to depend on whether the employer was given knowledge of this defect when the pre-employment physical examination was given. Both California and Kentucky refuse to apportion such latent conditions. As the Kentucky Court, in *Wood-Mosaic Co. v. Shumate*,[30] colorfully explained:

> ". . . an employee might be compensated for disease disability, provided such disease had continuously lain in a completely harmless and inert condition, like some sleeping dog that might never awaken, until along came the vicious kick of a traumatic injury and aroused it into an active disability."

IV. CONCLUSION

In conclusion, before the enactment of apportionment statutes or second injury fund laws, the handicapped worker with a pre-existing condition either had little chance for recovery in states where the unusual exertion doctrine was followed, or found employment made more difficult in those states which adhered to the harsh Massachusetts rule. The employer, who happened to have had such a handicapped person working for him, might find himself paying for the industrial injury and any aggravation caused by the prior defect. These inequitable results have been, for the most part, cured by enactment of apportionment laws. Mississippi's new apportionment law, while restricted to cases in which the prior defect was discovered by a pre-employment physical examination, should ease the inequities found in the past. Whether or not this law will produce a harmonious balance between the handicapped worker, the employer and society is doubtful. Much could depend upon future judicial interpretation of this Act.

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[27] Bowler v. Industrial Accident Comm., 135 Cal. App. 534, 287 P.2d 562 (1955).
[28] 212 Md. 214, 129 A.2d 162 (1957).
[29] 70 Ariz. 179, 218 P.2d 488 (1950).
[30] 305 Ky. 368, 204 S.W.2d 331 (1947).

Thomas D. Berry, Jr.

RECENT DECISIONS

Constitutional Law – Right To Reject Counsel As Element Of Due Process

Defendant was convicted of simple assault and assault with a dangerous weapon. The District of Columbia criminal court entered judgment and defendant appealed. The District of Columbia Court of Appeals (en banc) affirmed conviction. Held:[1] Affirmed. District of Columbia criminal court did not commit reversible error when it directed court-appointed counsel to proceed with trial after counsel's disclosure that defendant had stated desire for new lawyer because appointed counsel had expressed opinion that he could not get an acquittal. *Brown v. United States,* 27 U.S.L. Week 2385 (D.C. Cir. Feb. 2, 1959).

The right of a defendant in a criminal case to have the assistance of counsel for his defense is constitutionally guaranteed in Federal courts by the sixth amendment.[2] In contrast, the right of a defendant to defend himself in a criminal case in a Federal court is statutory.[3] It is from this statutory right to defend one's self that the correlative right to reject counsel logically should derive. The Federal courts of appeal have, in effect, consistently subordinated the statutory right to the constitutional right by invalidating those waivers of counsel considered by the courts of appeal to have been made unintelligently, incompetently, or involuntarily. Among the factors considered in invalidating those waivers have been the age of the defendant,[4] the seriousness of the offense,[5] the ignorance of the defendant,[6] the insanity of the defendant,[7] and the use of coercion in obtaining the waiver.[8] The action of the Federal courts in invalidating some waivers while validating others apparently results from the "fair trial" doctrine expounded in *Betts v. Brady*.[9] The essence of this doctrine is merely that the trial must be "fair," but the criteria to be applied in determining "fairness" are not set forth. The Supreme Court's refusal to establish any fixed criteria has resulted in uncertainty as to the discretion which the trial court has in accepting or rejecting a defendant's waiver of counsel when he wishes to defend himself. In comparison, the situation in the state courts is basically the same. The criteria to be applied by the trial courts in accepting or rejecting waivers of counsel in state criminal proceedings are, if anything, even more vague. However, the manner in which this situation arose in the state courts has had a history which distinguishes it somewhat from the situation in the Federal courts. Although the right to counsel in criminal cases in Federal courts had long been recognized as guaranteed by the sixth amendment, it was not until the *Powell*[10] decision was handed down that this same right was extended to defendants in state criminal proceedings. The United States Supreme Court relied on the due process clause of the Fourteenth Amendment[11] in making its decision, and even then the Court did not go so far as to say that such a right extended to cases other than capital offenses. As a result of this decision, however, every state has made either constitutional or statutory provision for counsel in capital cases,[12] and all but five[13] have made similar provisions for less serious criminal offenses. The great majority of states at the same time provided that the defendant might waive counsel, either expressly or impliedly, and defend himself.[14] The general effect of the *Powell* case can safely be said to have been restrictive upon procedure in state criminal courts. Then came the *Betts* case, and its "fair trial" doctrine caused the situation previously described as existing in the Federal courts to arise in the state courts as well.

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[1] Decision was 5-4 with J. J. Washington, Edgerton, Bazelon and Fahy dissenting.

[2] U. S. Const. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

[3] 28 U.S.C. § 1654 (1952). "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

[4] Moore v. Michigan, 355 U.S. 155 (1957).

[5] Chandler v. Fretag, 348 U.S. 3 (1954); Snell v. U.S., 174 F. 2d 580 (10th Cir. 1949).

[6] Moore v. Michigan, supra note 4; U.S. v. Nickerson, 124 F. Supp. 35 (D.C. Mass. 1954).

[7] Massey v. Moore, 348 U.S. 105 (1954).

[8] Moore v. Michigan, supra note 4; Widmer v. Johnston, 136 F.2d 416 (9th Cir. 1943).

[9] Betts v. Brady, 316 U.S. 455 (1942).

The specific law applicable to the instant case is limited by the relatively recent interest in this particular situation. The first criminal case in the Federal courts concerning the law applicable to the instant case did not arise until 1943, one year after the *Betts* case was decided. This case was *U.S. v. Mitchell,*[15] and the sequence of the *Betts* and *Mitchell* cases seems highly significant since the Federal circuit court, in reviewing Mitchell's conviction in the trial court, applied the "fair trial" doctrine of the *Betts* case and held that under the circumstances of the case it was within the trial court's discretion to accept or reject the defendant's waiver of counsel. Had the question arisen before the *Betts* decision was handed down, it is likely that the reviewing court in the *Mitchell* case would have held the trial court's action a denial of procedural due process. The precedent thus established was apparently approved by the Supreme Court inasmuch as certiorari was denied on the question.[16] This precedent has since been followed in every Federal case in point.[17]

Probably the most significant thing about the instant case lies in the split between the court, as such a split is also characteristic of the

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[10] Powell v. Alabama, 287 U.S. 45 (1932).

[11] U.S. Const. amend. XIV, § 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

[12] Equal Justice for the Accused, a report on the provision of counsel for indigent defendants by a Special Committee of The Association of the Bar of the City of New York and The National Legal Aid Association, appendix (1959).

[13] Alabama, Massachusetts, Mississippi, Pennsylvania, South Carolina.

[14] See note 13 supra.

[15] U.S. v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).

[16] U.S. v. Mitchell, 321 U.S. 794 (1943).

[17] U.S. v. Gutterman, 147 F.2d 540 (2d Cir. 1945); Swope v. McDonald, 173 F.2d 852 (9th Cir. 1949).

Supreme Court in such an area.[18] While the majority of one favors the *Betts* approach, the strong minority just as strongly favors a strict due process approach. This writer believes the instant case is the latest instance of the dilemma confronting the trial courts as a result of the *Betts* decision. So far the Supreme Court has given its tacit approval to what would seem the better horn of the dilemma. In view of the tendency of the Supreme Court to rely alternately upon the strict procedural due process approach and the *Betts* approach, it will be most interesting to note the outcome of an appeal to the Supreme Court if such an appeal is made.

E. Roy Hunt

CONSTITUTIONAL LAW — SEARCH AND SEIZURE INCIDENT TO A LAWFUL ARREST

Two deputy sheriffs, armed with a bench warrant, went to the house of the defendant to arrest him, his wife and a boarder for selling alcoholic beverages in a local option territory. Upon finding only the wife, the officers arrested her and thoroughly searched the house, finding a quantity of gin and beer in a closet, in the refrigerator and under the stove. Defendant was convicted and appealed on the ground that the evidence was procured in an unlawful manner. HELD: Reversed. Following the dissent in *Harris v. United States*[1] and *United States v. Rabinowitz*,[2] the Court held that the authority to search a person upon a lawful arrest does not extend to the entire house and that evidence so gained is inadmissable. The meaning of section 10 of the Kentucky Constitution and the Fourth Amendment to the United States Constitution are essentially the same. *Benge v. Commonwealth of Kentucky*, 27 U.S.L. Week 2422 (Ky. March 3, 1959).

To a large degree courts are in agreement as to the authority of officers to search parties arrested without the aid of a search warrant. It is agreed that they may search the person of the arrestee.[3] Although few decisions have limited the authority to search at this point, the degree beyond which the arresting officer may go without exceeding his power varies not only according to the jurisdiction, but varies from case to case within each jurisdiction. Various rules have been established. Federal courts and the Kentucky Court have held that arresting officers may search the person and that area under his "immediate control."[4] *Harris v. United States* pointed out that the extent to which a search can be made depends upon the nature of the item sought in connection with the arrest. There it was decided that when one is arrested upon a charge of mail fraud involving certain checks, the search may be much more detailed than if the search incident to the arrest was for an automobile.[5] Other cases have distinguished between searching in a public business and in a private dwelling.[6] It has also been held that "fruits of the crime" for which the arrest is made and "tools of the crime" may be seized, but mere evidence cannot.[7] While the principal case did not consider these points specifically, the dissents which the decision in the instant case follows are very outspoken.[8] In the *Harris* case Justice Frankfurter, dissenting, went to great lengths to show that the purpose of the Fourth Amendment was to protect citizens from general exploratory searches. He maintained that searches such as that made in the *Harris* case[9] make it possible to frustrate the constitutional provision[10] by simply making an arrest before beginning the unauthorized search. Mr. Justice Jackson filed a separate dissent saying that he believed the authority to search following an arrest extended no further than the person and a very limited area under his "immediate control." This area certainly does not extend to the entire house. The Kentucky Court, in the principal case, said that this question was novel before that Court, but relied upon federal precedents since their constitutional provision was essentially the same as the Fourth Amendment.[11] Within the area of federal cases involving search upon arrest, there are two distinct lines, both seeming to have a great deal of prestige. Following one of these decisions,[12] the Kentucky court could easily have decided that the premises were properly searched. Instead they chose to follow the other line which is epitomized in the *Harris* and *Rabinowitz* dissents. Although the Fourth Amendment to the United States Constitution does not prohibit the admissibility of evidence gained by unlawful search and seizure, both the Federal Courts[13] and the Kentucky Court[14] have adopted the rule that such evidence is inadmissible in their respective jurisdictions.

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[18] Crooker v. State of Cal. 357 U.S. 433 (1958). Mr. Justice Douglas, joined in dissent by Chief Justice Warren and J. J. Black and Brennan, said: "The demands of our civilization expressed in the Due Process require that the accused who wants a counsel should have one at any time after arrest."

[1] 331 U.S. 145 (1946).

[2] 339 U.S. 56 (1950).

[3] Weeks v. United States, 232 U.S. 383 (1914); United States v. Mills, 185 Fed. 318 (S.D. N.Y. 1911), *writ of error dismissed* 220 U.S. 549 (1911); Agnello v. United States, 269 U.S. 20 (1925); Marron v. United States, 275 U.S. 192 (1927); Billings v. Commonwealth, 223 Ky. 381, 3 S.W.2d 770 (1928); Commonwealth v. Phillips, 224 Ky. 117, 5 S.W.2d 887 (1928); Morris v. Commonwealth 231 Ky. 838, 22 S.W.2d 295 (1929).

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[4] Boyd v. United States, 116 U.S. 616 (1886); Agnello v. United States, supra note 3; Carrol v. United States, 267 U.S. 132 (1925); Billings v. Commonwealth, supra note 3; Johnson v. Commonwealth, 216 Ky. 175, 287 S.W. 572 (1926).

[5] Harris v. United States, supra note 1 at 152.

[6] United States v. Rabinowitz, 339 U.S. 56 (1950).

[7] Marron v. United States, 275 U.S. 192 (1927); Brady v. United States, 300 Fed. 540 (6th Cir. 1924), *cert. denied* 266 U.S. 620 (1924).

[8] In Harris v. United States, 331 U.S. 145 (1946), Justice Frankfurter attached an extensive chart to his dissent tracing the history of the opinions handed down from the U.S. Supreme Court on the question from 1914 up to the date of the Harris opinion. It is his conclusion that the Court has in its handling all but stripped the Fourth Amendment of its meaning. Mr. Justice Jackson dissenting in the *Harris* case says that case and those leading up to it create an escape from the purview of the Fourth Amendment by allowing practically unlimited exploratory searches without a warrant under the guise of a search incident to a lawful arrest. In the Rabinowitz case, supra note 2, Justice Frankfurter repeats his view along with Justice Black, both writing dissenting opinions.

[9] In the Harris case, supra note 8, federal agents arrested the defendant in his living room armed with a warrant for his arrest but having no search warrant. Then they searched the entire four room apartment for five hours seeking two canceled checks. Instead they found, in a sealed envelope, several draft cards. These were used to obtain a conviction for violation of the Selective Training & Service Act of 1940.

[10] Ky. Const., § 10 reads as follows: "Security from search and seizure; conditions of issuance of warrant. The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place or seize any person or thing, without describing them as nearly as may be, not without probable cause supported by oath or affirmation."

[11] Benge v. Commonwealth, 27 U.S.L. Week 2422 (Ky. March 3, 1959); Youman v. Commonwealth 189 Ky. 152, 224 S.W. 860 (1920).

It is believed that the Court, in the noted case, adopted the sounder of the two available lines of authority. As Mr. Justice Frankfurter has pointed out, the guarantee of freedom from unreasonable search and seizure is more often invoked by so-called undesirable citizens than other Constitutional guarantees such as freedom of speech and religion. Hence, this fundamental right has more often been neglected. However, once the authority to search goes to the extent of "ransacking his house" as it was described in the noted case, it would appear that the constitutional guarantee requires no more than a formal arrest. Obviously, even with the strictest limitations there will and should always be an area of judgment. It will always be necessary for the courts to determine what is meant by the "person" and the area under his "immediate control." But this task of construction must be met within the limits of stare decisis. The courts have been too erratic to provide such a guide. The problem now is to give both courts and executive officers a method of discerning with some degree of accuracy the limits of the arresting authority. If the *Harris* and *Rabinowitz* dissents and the noted case should become prevailing law, it would seem to give greater protection to the constitutional guarantees while costing little more than an occasional inconvenience for police officers. This loss will be more than compensated by the availability of a guide for the arresting officer.

J. E. Pool

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[12] Cases which hold that there is a broad authority to search the premises following a lawful arrest are: Agnello v. United States, 269 U.S. 20 (1925); Marron v. United States, 275 U.S. 192 (1927); Davis v. United States, 328 U.S. 582 (1946); Harris v. United States, 331 U.S. 145 (1946); United States v. Rabinowitz, 339 U.S. 56 (1950).

[13] Wolf v. People of Colorado, 338 U.S. 25 (1948), held that the guarantee of the Fourth Amendment does not effect the admissability of matter gained by unlawful search and seizure as evidence in a criminal case. However the federal courts held that matter so gained is inadmissable. Weeks v. United States, 232 U.S. 383 (1914); Silverthorn Lumber Co. v. United States, 251 U.S. 385 (1920); Gould v. United States, 255 U.S. 298 (1921); Amos v. United States, 255 U.S. 313 (1921).

[14] Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920); Potowick v. Commonwealth, 198 Ky. 843, 250 S.W. 102 (1923); Clark v. Commonwealth, 204 Ky. 740, 265 S.W. 280 (1924).

Constitutional Law — State Taxation of Interstate Commerce

Appellant was an Iowa corporation whose activities in Minnesota consisted of the regular and systematic solicitation of orders from a list of eligible dealers. Forty-eight per cent of Appellant's total sales were made to such dealers in Minnesota. Under Minn. Stat. § 290.03 (1945),[1] which imposed an annual tax on the taxable net income of domestic and foreign corporations whose business within the state consisted exclusively of interstate commerce, Minnesota brought action against Appellant to collect income taxes for the years 1933 through 1948. Appellant resisted the tax as contrary to the commerce clause. Appellant's activities[2] within Minnesota were found to be an integral part of its interstate activities, and all revenue by it from customers in Minnesota resulted from its operations in interstate commerce. **Held**: Affirmed. The net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is apportioned[3] to local activities within the taxing state forming sufficient nexus to support the same. *Northwestern States Portland Cement Co. v. Minnesota,* 79 S. Ct. 357 (1959).

It has been long established that a state tax upon a corporation doing only an interstate business may be invalid because levied (1) upon the privilege of doing interstate business within the state, or (2) upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself.[4] A state cannot levy a

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[1] An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both.

[2] Appellant maintained a small sales office in Minneapolis where it employed two salesmen and a secretary. It also employed three other salesmen elsewhere in Minnesota who worked out of their homes. Apart from the small amount of furniture in the Minneapolis office and two automobiles used by the salesmen, Appellant owned no property within the state, maintained no bank account there and warehoused no merchandise in Minnesota. All salaries and expenses were paid directly from the Iowa office. The salesmen were not authorized to accept orders, collect payments, or adjust claims. Orders were acknowledged directly to the purchaser and were filled by delivery to a rail carrier and consigned to the purchaser.

[3] Appellant's tax liability was determined by the use of the three factor formula prescribed by Minn. Stat. § 290.19 (1945). The following application defines and illustrates the use of the three factors:

(1)	Ratio of taxpayer's sales assignable to Minnesota to its total sales for the year wherever made	48.449%
(2)	Ratio of taxpayer's total tangible property in Minnesota to its total tangible property used in the business that year wherever situated	.1142%
(3)	Ratio of taxpayer's total payroll in Minnesota to its total payroll for the entire business	1.6484%
	Total	50.2119%
	Arithmetical Average	16.7373%

The final average of 16.7373 per cent represents the percentage of Appellant's income allocable to Minnesota for the 1948 fiscal year.

[4] Memphis Gas Co. v. Stone, 335 U.S. 80 (1948); Pacific Telephone & Telegraph Co. v. Tax Commission, 297 U.S. 403 (1936); Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U.S. 160 (1903); Leloup v. Port of Mobile, 127 U.S. 640 (1888); Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887).

tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of engaging in such commerce.[5] A privilege tax,[6] a franchise tax,[7] or an excise tax[8] cannot be imposed on a foreign corporation. Such taxes, levied by a state on a domestic corporation, may be measured by the net income attributable to business done within the state,[9] but the constitutional infirmity of a tax on the privilege of carrying on exclusively interstate business persists no matter how fairly it is apportioned to business within the state.[10] The amount is unimportant when there is no legitimate basis for the tax.[11] A thorough search by the states for legitimate bases have uncovered several: "local business"[12] will support a franchise tax apportioned to business done within the state; "local activity"[13] is a legitimate basis for a non-discriminatory privilege tax; and "local events,"[14] apart from the flow of interstate commerce, provide taxable incidents. It was against this background that Mr. Justice Whittaker observed, "Inasmuch as it has always been thought by American lawyers that the states cannot tax interstate commerce but may tax intrastate commerce, it has been deemed necessary for the state to determine what portion of the total income of the taxpayer was derived from intrastate commerce done within its borders and is therefore subject to its taxing powers."[15]

Does the instant case really hold otherwise? It is submitted that it does not. The Court has merely abandoned the use of tags, such as "taxable events," and has adopted a pragmatic approach of determining whether the taxing powers exterted by the state bears any fiscal relation to protection, opportunities, and benefits given by the state, and whether the state has given anything for which it can ask a return.[16] The Court has said simply that a state may tax interstate commerce *if* there be a sufficient nexus between the tax and the transaction taxed. Only local activities can furnish a nexus, and thus, the question now becomes, not what local activities constitute intrastate commerce, but what local activities form a sufficient nexus.[17] The decision, therefore, opens no new source of revenue to the states; it only allows them to call the old source by its proper name.

Alfred E. Moreton

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[5] Ozark Pipe Line v. Monier, 266 U.S. 555 (1925).

[6] Postal Telegraph Cable Co. v. Adams, 155 U.S. 688 (1895).

[7] Ozark Pipe Line v. Monier, supra note 5.

[8] Alpha Portland Cement Co. v. Massachuesetts, 268 U.S. 203 (1925); Cheney Brothers Co. v. Massachusetts, 246 U.S. 147 (1918).

[9] Matson Navigation Co. v. State Board of Equalization, 297 U.S. 441 (1936).

[10] Spector Motor Service v. O'Connor, 340 U.S. 602 (1951).

[11] Alpha Portland Cement Co. v. Massachusetts, supra note 8.

[12] International Shoe Co. v. Shartel, 279 U.S. 429 (1929).

[13] Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662 (1949), upheld Miss. Code Ann. §§ 10105 and 10109 (1942).

[14] Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948).

[15] Northwestern States Portland Cement Co. v. Minnesota, 79 S.Ct. 357, 375 (1959) (dissenting opinion).

[16] Wisconsin v. J. C. Penny Co., 311 U.S. 435 (1940).

[17] Mr. Justice Whittaker points out that Appellant's activities might very well constitute intrastate commerce. Northwestern States Portland Cement. Co. v. Minnesota, supra note 15 at 371 (dissenting opinion).

CRIMINAL LAW — MISCEGENATION — INCEST

Defendant, a negro woman, was convicted by the trial court of cohabitating with a white man in violation of Section 2000, Code of 1942.[1] The Statute provides that cohabitation between a white person and a negro, whose marriage is prohibited by law by reason of race or blood, "and which marriage is declared to be incestuous and void," shall be a felony. HELD: Reversed. Cohabitation between a white person and a negro is not punishable under Section 2000 since incest is made an element of the crime and cohabitation between persons of different races is "miscegenetic" and not "incestuous." *Ratcliff v. State,* 107 So.2d 738 (Miss. 1958).[2]

Section 457, Code of 1942, prohibits marriage between persons within certain degrees of consanguinity. Section 458 prohibits marriage between persons within certain degrees of affinity. These marriages are declared to be "incestuous and void." Section 459, Code of 1942,[3] prohibits the marriage of a white person and a negro. This marriage is declared to be "unlawful and void." In amending Section 2000 of the Code, by Chapter 241, Laws of 1956, which added the words, "or persons whose marriage is prohibited by law by reason or (of) race or blood and which marriage is declared to be incestuous and void," the Legislature obviously attempted to prescribe the same punishment for miscegenetic cohabitation, adultry or fornication as was already prescribed for incestuous cohabitation, adultry or fornication. Undoubtedly the words "incestuous and void" were inadvertently added. Clearly this was a penalty relating to miscegenation. The court chose to follow the general rule of strict construction for penal statutes, which requires that an act come within the letter, as well as the spirit, of the act prohibited. Although the weight of authority would probably agree with this result,[4] authority exists to the effect that a penal statute should be interpreted according to the obvious intent of the legislative body which passed the statute.[5] Apparently the courts have been even more careful not to extend statutes beyond their "letter" in incest cases than in other criminal areas.[6] Since it obviously was the intent of the Legislature to encompass miscegenetic relations within Section 2000 of the Code, and Section 459 does include such relations, it would be well to examine the miscegenation statutes found in the laws of other states, and the constitutionality of such acts. There are twenty-three states, in addition to Mississippi, which have laws in effect at the present time that prohibit marriage between white persons and negroes.[7] Most of the statutes declare that such marriages are void, rather than voidable. Only seven of these twenty-four states fail to provide punishment for such marriages.[8] Although miscegenation statutes have been consistently attacked as unconstitutional, with one exception,[9] the courts have declared that the regulation of marriage is a power of the state and that the statutes prohibiting miscegenetic marriages are not in conflict with the Fourteenth Amendment.[10] It has also been held that when persons who are prohibited from marrying, leave their state of domicile in order to evade the prohibition, and then return to the state of their domicile, the laws of that state are still controlling, and the marriage is null and void, thus making the parties subject to whatever punishment such state prescribes.[11] The Mississippi statutes on miscegenation are more comprehensive than the statutes in most of the other states. Apparently, no other state has attempted to make "a single act"[12] of miscegenetic adultery or fornication a felony,[13] and so far as this writer can determine, only three other states prescribe a more severe penalty for adultry and fornication, or cohabitation, between a white person and a negro than they do for adultery and fornication or cohabitation between persons of the same race.[14] Only one case has gone to the Supreme Court of the United States to test the validity of a statute which imposed a greater penalty for adultery or fornication committed between a white person and a negro, than adultery or fornication committed between members of the same race. In upholding the validity of this statute, the Court, in *Pace v. Alabama,* 106 U.S. 583 (1883), said: "The two sections of the code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed where the two sexes are of different race . . . . Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the persons of any particular color or race. The punishment of each offen-

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[1] "Persons being within the degrees within which marriages are declared by law to be incestuous and void, or persons whose marriage is prohibited by law by reason or (of) race or blood and which marriage is declared to be incestuous and void, who shall cohabit, or live together as husband and wife, or be guilty of a single act of adultery or fornication, upon conviction shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years."

[2] A companion case, Rose v. State, 107 So.2d 730 (Miss. 1958), in which the defendant was a white woman, was decided on the same day. A like question was presented and the same conclusion was reached by the Court.

[3] "The marriage of a white person and a negro or mulatto or person who shall have one-eighth or more of negro blood, or with a Mongolian or a person who shall have one-eighth or more of Mongolian blood, shall be unlawful, and such marriage shall be unlawful and void; and any party thereto, on conviction, shall be punished as for marriage within the degrees prohibited by the last two sections; and any attempt to evade this and the two preceding sections by marrying out of this state and returning to it shall be within them."

[4] In State v. Traylor, 100 Miss. 544, 56 So. 521 (1911), the court said: "We know of no rule of law which will justify the court in convicting a person of any crime, unless the offense comes under the letter of the statute . . . criminal statutes must be strictly construed." In City of Cincinnati v. Levine, 81 Ohio App. 181, 75 N.E.2d 177 (1947) the court said: "A statute defining a crime . . . cannot be extended, by construction, to persons or things not within its descriptive terms, though they appear to be within the reason and spirit of the statute." Also in accord with this view are: McInnis v. State, 97 Miss. 280, 52 So. 634 (1910); Lever Bros v. Erbe, 87 N.W.2d 469 (Iowa 1958); and United States v. One Electronic Pointmaker, 149 F. Supp. 417 (D.C. Ind. 1957).

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[5] The Mississippi Supreme Court in Bobo v. Board of Levee Comm'rs., 92 Miss. 792, 46 So. 819 (1908), stated: "While it is true that penal statutes should be strictly construed, it is undoubtedly the duty of the courts to look to the mischief intended to be prevented, and to take into consideration the character of the remedy proposed to be applied, in doing which the mere letter must yield to the manifest spirit." In Rainwater v. United States, 355 U.S. 534 (1958), the United States Supreme Court said: ". . . even penal provisions must be given their fair meaning in accord with the evident intent of Congress." These cases also follow the view of interpreting according to obvious intent: McDonald v. State, 32 Ala. 606, 28 So.2d 805 (1947); State v. Broussard, 213 La. 338, 34 So.2d 883 (1948); and State v. Rucker, 46 N. J. Super. 162, 134 A.2d 409 (1957).

[6] Chancellor v. State, 47 Miss. 278 (1872) decided that Section 2487 of the Revised Code of 1871 did not provide punishment for a man cohabitating with his step-daughter. Section 1763 of the Revised Code of 1871, prohibited marriage between a man and his wife's daughter. Section 2487, supra, provided punishment for cohabitation between persons "within the degrees of consanguinity, within which marriages are by law declared to be incestuous." The court held that since the statute employed the word "consanguinity" and did not use the word "affinity" the defendant was not guilty of any crime thereunder. In State v. Lee, 196 Miss. 311, 17 So.2d 277 (1944), the court held that although the statute in force at that time prohibited intercourse between a father and his daughter or step-daughter, the statute did not apply to intercourse between a father and his legally adopted daughter. This has since been changed by statute. The case of State v. Winslow, 208 Miss. 753, 45 So.2d 574 (1950) interpreted Section 458 and 2234 of the Code of 1942 as not providing punishment for marriage between a man and his mother-in-law. Section 458, supra, prohibits marriage between a father and his daughter-in-law, and says, "the like prohibition shall extend to females in the same degree." This last clause would seem to indicate that a mother-in-law is not to marry her son-in-law. However, the court refused to accept this view; declared that the statute was ambiguous and turned the defendant loose. The following cases placed similar restrictions on incest statutes: State v. Youst, 74 Ohio App. 381, 59 N.E.2d 167 (1943); Ex parte Bourne, 300 Mich. 398, 2 N.W.2d 439 (1942); and State v. Andrews, 167 Iowa 273, 149 N.W. 245 (1914).

[7] Ala. Code, tit. 14 § 360 (1940); Ariz. Rev. Stat. tit. 25, § 101 (1956); Ark. Stat. Ann. tit. 55, §§ 104, 105 (1954); Del. Code Ann. tit. 13, § 101 (1953); Fla. Stat. Ann. § 741.11 (1944); Ga. Code Ann. tit. 53, § 106 (1935); Idaho Code tit. 32, § 206 (1947); Burns' Ind. Stat. tit. 44, §§ 104, 105 (1933); Ky. Rev. State. § 402.020 (1959); La. C. C. art. 94 (1952); Ann. Code of Md. art. 27, § 398 (1957); Mo. Rev. Stat. § 451.020 (1949); Neb. Rev. Stat. §§ 42-103 (1943); Nev. Rev. Stat. § 122.180 (1957); N.C. Gen. Stat. c. 51, § 3 (1950); Okl. Stat. tit. 36, § 402 (1956); S.C. Code of Laws tit. 20, § 7; (1952); Tenn. Code Ann. tit. 36, § 402 (1956); Vernon's Tax Stat. art. 4067 (1948); Utah Code Ann. tit. 30, c. 1, § 1 (1953); Code of Va. § 20-54, 20-59 (1950); W. Va. Code Ann. § 4694 (1954); Wy. Comp. Stat. § 50-108 (1945).

[8] Arizona, Delaware, Idaho, Indiana, Kentucky, Nebraska, and Utah.

[9] The California Supreme Court held that their statutes pertaining to miscegenation, Cal. C. C. Sections 60 and 69, were in violation of the Fourteenth Amendment

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in Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948), by a decision of four to three. There was a vigorous dissent. The statutes prohibited marriage between a white person and a Negro, Mongolian, Malay, or Mulatto.

[10] Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955); Jackson v. State, 37 Ala. App. 519, 72 So.2d 114 (1954); Rogers v. State, 37 Ala. App. 582, 50 So.2d, (1954); Stevens v. United States, 146 F.2d 120 (10th Cir. 1944); Jackson v. City and County of Denver, 109 Colo. 196, 124 P.2d 240 (1942); State v. Pass, 59 Ariz. 16, 121 P.2d 882 (1942); In re Paquet's Estate, 101 Ore. 393, 200 Pac. 911 (1932); In re Hobbs, 12 Fed. Cas. 262, No. 6550 (C.C.N.D. Ga. 1871); State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42 (1871); Frashier v. State, 3 Tex. App. 263, 30 Am. Rep. 131 (1877); State v. Jackson, 80 Mo. 175, 50 Am. Rep. 499 (1883); Dodson v. State, 61 Ark. 57, 31 S.W. 977 (1895); and Lonas v. State, 50 Tenn. 287 (1871).

[11] Miller v. Lucks, 203 Miss. 824, 36 So.2d 140 (1948). In this case, although the court allowed the white husband of a negro woman (the couple had resided in Illinois) to inherit the property which she owned in Mississippi, it stated that Mississippi would not have had to recognize the marriage if the couple had tried to establish residence within the state. Stevens v. United States, 146 F.2d 120, (10th Cir. 1944); In re Shun T. Takashashi's Estate, 113 Mont. 490, 129 P.2d 217 (1942); Eggers v. Olson, 104 Okl. 297, 231 Pac. 483 (1924); State v. Kennedy, 76 N.C. 251, 22 Am. Rep. 683 (1877); Greenhow v. James, 80 Va. 636, 56 Am. Rep. 603 (1885).

[12] The Court also cast doubt on the interpretation of this part of Section 2000 of the Code of 1942. On page 730 in the case of Ratcliff v. State, 107 So.2d 728 (Miss. 1958) the Court said: ". . . it presents a serious question whether or not the persons sought to be brought within the terms of Code Section 2000 by the 1956 amendment must be married to be guilty under the Statute. It is probable that the Legislature meant by use of the words 'persons whose marriage is prohibited' to include persons who are prohibited by law from marrying; and by use of the words, 'which marriage' to mean 'between whom marriage is declared, etc.' "

[13] It is to be noted that this also applies to incestuous fornication or adultery.

[14] Alabama, Florida, and Louisiana.

ding person, whether white or black, is the same."

Certainly recent decisions in the fields of education, transportation, and recreation, would cause one to wonder how long the Supreme Court will allow any statute to stand which uses the term "race" to draw a distinction. However, it is submitted that the Supreme Court will not invalidate the miscegenation statutes, for some time at least. This conclusion is based on the fact that one-half of the states in the Union have miscegenation statutes of some kind, and the further fact that on two different occasions within the last five years the Court has deliberately avoided deciding cases pertaining to miscegenation statutes.[15] Therefore, if Section 2000 of the Code of 1942 is to serve the purpose that the legislature undoubtedly intended it to serve, the section should be amended.[16]

Charles W. Pickering

FEDERAL DECLARATORY JUDGMENT ACT—ACTUAL CONTROVERSY IN CLASS ACTIONS

Appellant, a Negro resident of Memphis, Tennessee, boarded a city bus in Memphis and seated himself in the front section of the vehicle. The bus driver told appellant to move to the rear of the bus, and shortly after appellant's refusal to comply, two police officers entered the bus and commanded the appellant to "go to the back of the bus, get off, or be arrested." Thereupon the appellant left the bus and subsequently brought this action for a declaration as to his claimed constitutional right and that of others similarly situated, and for injunctive relief against enforcement of Tenn. Code Ann. §§ 1704-1709 (1955), which require segregated seating on buses such as the one on which appellant rode. The action was dismissed by the District Court[1] on the ground that no "actual controversy" existed within the intendment of the Declaratory Judgment Act,[2] inasmuch as appellant had ridden a bus in Memphis only on this occasion and had "boarded the bus for the purpose of instituting this litigation, and was thus not representative of a class of colored citizens who do use the buses in Memphis as a means of transporation." HELD: Reversed. The District Court erred in not proceeding to the merits in that the facts constitute an "actual controversy," notwithstanding that appellant rode the bus only on this occasion and that he did so solely for the purpose of bringing this action. *Evers v. Dwyer,* 79 S. Ct. 178 (1958).

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[15] Naim v. Naim, 167 Va. 80, 87 S.E.2d 749 (1955); *remanded,* 350 U.S. 891 (1955). The Virginia Court ruled that the record had been adequate for both the trial court and the Court of Appeals to render a decision on the merits of the case and that there was no procedure whereby they could follow the order of the United States Supreme Court by sending the case back to the trial court. They then adhered to their former decision. 187 Va. 734, 90 S.E.2d 1849 (1956); *cert. denied,* 350 U.S. 985 (1956). The Supreme Court also denied a writ of certiorari for the case of Jackson v. State, 37 Ala. App. 519, 72 So.2d 114 (1954), at 348 U.S. 888 (1954).

[16] The Section could be amended by inserting the following clause in place of the clause inserted in the Section by Chapter 241, Laws of 1956: ". . . or persons who are prohibited by law from marrying by reason of race or blood and between whom marriage is declared to be unlawful and void." "Unlawful and Void" is used to correspond with the language of Section 459. "Miscegenetic and void" could be used, but in that case Section 459 would probably need to be amended accordingly

[1] 3 Race Relations Law Reporter 743 (W.D. Tenn. 1958).

[2] 28 U.S.C. § 2201 (1952).

The law is well settled that a declaratory judgment action is available only in those cases involving an actual controversy.[3] The principles of law relating to the elements necessary to constitute an actual controversy are equally well settled. There seems to be universal agreement that a controversy in the constitutional sense[4] must be one that is appropriate for judicial determination, be definite and concrete, touching legal relations of parties having adverse legal interests, and be a real and substantial controversy admitting of specific relief through a decree of conclusive character.[5] That the judicial power does not extend to giving advisory opinions or to determination of abstract or hypothetical propositions also has been formally acknowledged.[6] It is apparent that the words and phrases so used in promulgation of the requisite elements of an "actual controversy" are of such general nature[7] that application to factual situations is largely a matter of judicial discretion and degree[8]—with the right of final determination necessarily being retained by the highest court. When it is considered that these few legal principles must be applied to all the many and diverse areas of law,[9] it is evident that these principles must be general, and that the matter is largely one of judicial discretion with residual finality in the foremost tribunal is evidenced by the frequent reversals of lower court decisions on this point.[10] In class actions instigated to contest legislation on the ground that it denies equal protection of the laws, in order to present an "actual controversy," a party complaining must show that he is a member of the class discriminated against.[11] It is on this point that the District Court and the Supreme Court have a parting of the ways, for the former places emphasis on the fact that the appellant rode the bus *solely* for the purpose of creating a lawsuit, taken in conjunction with the fact that the appellant's bus trip was his *only* venture on a city bus in Memphis. To the District Court, therefore, the appellant was not a bona fide member of the class of Negro bus patrons. The Supreme Court, however, treating the statute as if it discriminated against all Negroes, not merely Negro bus patrons, made little or nothing of these facts, citing for support two cases, *Young v. Higbee Co.*[12] and *Doremus v. Board of Education,*[13] both of which involved monetary or "pocket-book" interests. In the latter case, a taxpayer's action, the court held the litigant's interest to be insufficient to allow the action to be maintained. The Supreme Court cited, in addition to the above cases, *Gayle v. Browder,*[14] more renowned as the *Montgomery Bus Case,* in which the effects of statutes and ordinances requiring segregated seating on buses in Montgomery were abolished. However, it appears in that case that the "actual controversy" issue was not raised, and a reading of the case shows that the parties contesting the statutes and ordinances were bus users *prior* to the incidents out of which the controversy arose. By comparison, it would seem that the reversal of the District Court in the noted case will have the effect of lessening the judicially imposed requirements of legal status necessitous in maintaining class actions of this kind, that is to say, that this decision implies that a party, unaffected by the operation of a statute or ordinance, but desirous of contesting the validity of such legislation, may raise constitutional questions simply by feigning membership in the class affected.[15]

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[3] Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941); Chicago Pneumatic Tool Co. v. Hughes Tool Co., 61 F. Supp. 767 (D.C. Del. 1945), *aff'd,* 156 F.2d 981 (8th Cir. 1946), *cert. denied,* 329 U.S. 781, (1946); Skelley Oil Co. v. Phillips Petroleum Co., 174 F.2d 89 (10th Cir. 1949), *reversed in part and vacated in part,* 339 U.S. 667 (1950); Nukk v. Shaughnessy, 125 F.Supp. 498 (S.D.N.Y. 1954), *reversed,* 350 U.S. 869 (1955).

[4] U.S. Const. art III, § 2, cl. 1. "The judicial Power shall extend to all Cases, in Law and Equity . . . ."

[5] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, (1937); Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952).

[6] Ashwander v. TVA, 297 U.S. 288 (1936); Coffman v. Breeze Corp., 323 U.S. 316 (1945); United Public Workers v. Mitchell, 330 U.S. 75 (1947); American Machine & Metals v. De Bothezat Impeller Co., 75 F.Supp. 421 (S.D.N.Y. 1947), *reversed,* 166 F.2d 535 (2d cir. 1948).

[7] For example: ". . . appropriate for judicial determination . . . ," ". . . touching legal relations . . . ," ". . . substantial controversy . . . ," ". . . adverse legal relations . . . "

[8] Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941); Crowell v. Baker Oil Tools, 49 F.Supp. 552 (S.D. Cal. 1943), *reversed,* 143 F.2d 1003 (9th Cir. 1944), *cert. denied,* 323 U.S. 760, (1944).

[9] As examples: Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), (insurance); Douglas v. City of Jeanerette, 319 U.S. 157 (1943), (freedom of religion); Perkins v. Elg, 307 U.S. 325 (1939), (citizenship); Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952), (interstate commerce); Terry v. Adams, 90 F. Supp. 595 (S.D. Tex. 1950), *reversed sub nom,* Adams v. Terry, 193 F.2d 600 (5th Cir. 1952), *reversed,* 345 U.S. 461, (1953), (right to vote).

[10] A graphic illustration of the discretionary nature and of the ease with which reversals are made is presented in Nukk v. Shaughnessy, 125 F. Supp. 498 (S.D.N.Y. 1954), *reversed,* 350 U.S. 869 (1955), where the District Court expounded the proposition that no "actual controversy" existed, stating, "Here the lack of any actual and existing controversy between the parties plaintiff and defendant is too clear for

In view of the general nature of the elements requisite to comprise an "actual controversy," one cannot validly assert criticism for a court's finding or failure to find an "actual controversy." Each finding or failure to find an "actual controversy" must be reached through the

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reasonable debate . . . ." The Supreme Court, in reversing without an opinion, held that an "actual controversy" did exist. The discretionary nature of reversals made on the point of "actual controversies" is further illustrated in the principal case under consideration, in the fact that both the District Court and the Supreme Court cite the same case, Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941), and quote the same passage in support of their holdings, but reach opposite conclusions.

[11] Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571 (1915); Shelley v. Kraemer, 334 U.S. 1 (1948). Another case, Barrows v. Jackson, 346 U.S. 249 (1953), suggests a modification of the rule. That case involved the constitutionality of a racially restrictive covenant, the issue being raised by one not a Negro. The court in that case stated, however, that this principle "has no application in the instant case" because a judgment against the defendant "would constitute a direct, pocketbook injury to her." It is evident that no monetary in jury was incurred in the principal case.

[12] 324 U.S. 204 (1945).

[13] 342 U.S. 429 (1952).

[14] 142 F.Supp. 707 (M.D. Ala. 1956), *aff'd,* 352 U.S. 903 (1956).

[15] In other cases involving class actions of a civil rights nature, the interests of the party or parties bringing the actions appear to be primarily for the benefit of

court's discretion and opinion, with the discretion exercised and the opinion formulated in light of the facts in each case as it is presented for adjudication. However, it also appears, without doubting the court's power of discretion in this regard, that such discretion may be abused and should be handled carefully. For example, if the Supreme Court's decision in the noted case is construed to mean that persons not bona fide members of a class can bring actions on behalf of bona fide members, persons interested only in undermining public policy and in rabble-rousing will be enabled to stir up litigation where such litigation is unwarranted and needless merely by the legerdemain of bringing themselves superficially within a class and posing as a bona fide member. If this construction of the noted case is followed, it will serve to create lawsuits and friction with public policy, both of which currently exist in over-abundance, and such a construction thus should be frowned upon and watched warily as an invitation sounding in uncompensated champerty.

John Ernest Mulhearn, Jr.

EMINENT DOMAIN — EFFECT OF ANTICIPATED SALE OF CONDEMNED LAND UPON TAKING FOR A PUBLIC USE AND NOT FOR A PRIVATE USE

The Pearl River Industrial Commission was created by Chapter 169, of the Mississippi Laws of 1956, to investigate the economic and engineering feasibility of developing the region bordering the Pearl River for industrial and recreational purposes. The investigation having proved that development was possible, the Mississippi Legislature, in Senate Bill 1724, authorized the creation of the Pearl River Valley Water Supply District to carry out the desired development. Organization and establishment of the District was to be according to the plan enunciated in Senate Bill 1724. The Commission was required to petition the Chancery Court of the First Judicial District of Hinds County for the creation of the District. A hearing was held at which appellants and other parties defendant had an opportunity to state reasons why the District should not be created. The Chancellor stated that the facts

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such parties instituting the litigation as well as for the benefit of other members of the class. For example: Terry v. Adams, 90 F.Supp. 595 (S.D. Tex. 1950), *reversed sub. nom.* Adams v. Terry, 193 F.2d 600 (5th Cir. 1952), *reversed,* 345 U.S. 461 (1953), held that Negro citizens and voters of a county could sue for themselves, and for those similarly situated in a suit against officers of a political association composed of white voters, and for a decree declaring that Negro voters were legally entitled to vote in elections held by the association. Davis v. Cook, 80 F.Supp. 443 (N.D. Ga. 1948), held that certain Negro teachers could maintain a class action alleging discrimination against Negro teachers in the application of salary schedules. In Monk v. Birmingham, 87 F.Supp. 538 (N.D. Ala. 1949), *aff'd sub nom,* Birmingham v. Monk, 185 F.2d 859 (5th Cir. 1950), *cert. denied,* 341 U.S. U.S. 940 (1951), the court allowed Negro property owners to bring a class action for a declaration that racially-restrictive zoning ordinances were invalid. The court in Holmes v. Atlanta, 124 F.Supp. 290 (N.D. Ga. 1955), *aff'd,* 223 F.2d 93 (5th Cir. 1955), *vacated,* 350 U.S. 879 (1955), permitted Negro citizens to maintain an action for themselves and other Negroes similarly situated for declaratory judgment and granted an injunction to enjoin city officials from preventing Negro citizens' use of city golf courses.

showed the practicability of creating the District and ordered an election in the counties involved. After an overwhelming approval by the electorate, the Chancellor entered a Final Decree creating the District. Appellants contend that the District will be vested with unconstitutional powers because it is authorized to take private property by eminent domain for private use thereby violating Sections 14 and 17 of the Missisipppi Constitution and the Fourteenth Amendment of the U. S. Constitution. HELD: Affirmed. The primary purpose for taking the land was for public use. The incidental private benefit from subsequent resale of the property was not of sufficient magnitude to defeat the right of exercise of eminent domain. *Culley v. Pearl River Industrial Commission,* 108 So.2d 390 (Miss. 1959).

The Mississippi Constitution states that private property may be taken for public use only upon payment of just compensation.[1] It further asserts that the question of "public use" is judicial. Some courts have strictly interpreted the phrase so that the general public must have a fixed use of the appropriated property as a matter of right[2] and not merely receive a benefit or convenience from the property.[3] A more liberal construction is given by other courts in holding that public use means public benefit or advantage.[4] Once the fact of public use has been established, the right of eminent domain will not be defeated merely because there is some incidental private benefit.[5] It is only when the private benefit is so great that it predominates[6] or when the private benefit cannot be separated from the public use[7] that a sovereign cannot exert the power of eminent domain. Invariably, when the statute providing for eminent domain includes a provision for the future sale or lease of the lands acquired, the contention is made that the taking is not for a public use since there is the possibility that the land will return to the hands of private citizens. The problem arose seldom, if at all, in the early days of our country.[8] One can attribute this to the fact that at first "public use" was more strictly interpreted and was applied not only to the initial taking but also to the subsequent use of the property. As the courts have expanded the limits of "public use,"[9] the legislatures and Congress have acted accordingly. Railroads, mining facilities, power plants, irrigation companies and other projects which benefit the public generally, but which are owned and operated by private corporations for private profit, were said to perform enough good for the public to permit the use of eminent domain in their support. Once the courts allowed the legislatures to delegate the power of eminent domain to accomplish those public uses, it was only a natural step for the legislature to try to condemn for a public purpose and to provide for the subsequent sale of the land for private profit as a means of continuing the public purpose. Although cases dealt with this problem earlier,[10] the area in which the problem of resale and public purpose has received more attention is in the area of urban redevelopment.[11] The theory behind this program is that the removal of slums is a public benefit. Once the public has been benefited by their removal, there is no reason for the land to go unused; so the courts have permitted sale of the land to private persons for profit.[12] This concept has been accepted in other areas of human experience by most jurisdictions so that now one might say that the rule is: the fact that a subsequent resale of lands acquired by eminent domain is anticipated has little effect, if any, upon the judicial determination of whether or not land was taken for a public use.[13] The question of resale might once again play an important role in the determination of public use when a statute, as the one in the noted case, includes provisions that make it possible for land in excess of the amount needed, to be condemned, and to be sold for private profit to others. If this is the case, then the use of the power of eminent domain is unconstitutional since it is generally accepted that property in excess of that required for public use may not be taken by eminent domain and sold for private profit.[14]

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[1] Miss. Const., Art. III, § 17 (1890).

[2] U.S. v. Certain Lands in City of Louisville, 297 U.S. 726 (1935); Ferguson v. Illinois Central R. Co., 202 Iowa 508, 210 N.W. 604, 54 A.L.R. 1 (1926); Collins v. Public Service Commission, 365 Mo. 1086, 293 S.W.2d 345 (1956).

[3] Memphis Freight Co. v. Memphis, 4 Coldw. 419 (Tenn. 1867); Peaby-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So. 2d 483, 172 A.L.R. 168 (1947); Crommett v. City of Portland, 150 Me. 217, 70 A.2d 841 (1954); Edens v. Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956).

[4] People of Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st. Cir. 1946), *cert. denied,* 329 U.S. 722 (1946); Gohid Realty Co. v. Hartford, 141 Conn. 135, 104 A.2d 365 (1954); Belovsky v. Redevelopment Authority, 357 Pa. 329, 54 A.2d 277, 172 A.L.R. 953 (1947).

[5] 2 Nichols, Eminent Domain 447 (3d ed. Sackman and Van Brent 1950): "If the use for which land is taken by eminent domain is public, the taking is not invalid merely because an incidental benefit will enure to private individuals." See also: Ermels v. Webster City, 246 Iowa 1305, 71 N.W.2d 911 (1955); Ottawa Hunting Association, Inc. v. State, 178 Kan. 460, 289 P.2d 754 (1955); People v. Public Building Commission of Chicago, 11 Ill. 2d 125, 142 N.E.2d 67 (1957); In re Slum Clearance in City of Detroit, 331 Mich. 714, 50 N.W.2d 340 (1951).

[6] 29 C.J.S., Eminent Domain § 29 (a), p. 817; 18 Am. Jur., Eminent Domain § 34, p. 658 and cases cited there.

[7] Kessler v. Indianapolis, 199 Ind. 420, 157 N.E. 547, 53 A.L.R. 1 (1927); Shizas v. Detroit, 333 Mich. 44, 52 N.W.2d 589 (1952).

[8] A look at the cases decided before the turn of the century will show the problem of resale involving the question of reversionary interests and the type of title acquired by eminent domain as determining the type of title to be sold rather than determining the question of the effect of resale upon the "public use."

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[9] It is interesting to watch the language of the courts as time progresses and as more social legislation is passed. As our population rapidly increases, the demand for space on which to build has become great. The people are relying more and more upon government to participate in areas heretofore thought of as being solely within the realm of individual rights and privileges. Witness the District Court of the District of Columbia in 1953: "The traditional concept of use as the keystone of eminent domain has been enlarged in modern thought and cases. We find it described as public purpose. The variation in the term from public 'use' to 'purpose' indicates a progression in thought . . . . These extensions of the concept of eminent domain, to encompass public purpose apart from public use, are potentially dangerous to basic principles of our system of government. And it behooves the court to be alert lest currently attractive projects impinge upon fundamental rights . . . . That the Government may do whatever it deems to be for the good of the people is not the principle of our system of government. Nor can it be, because the ultimate basic essential in our system is that individuals have inherent rights, and as to them the powers of government are sharply limited." Schneider v. District of Columbia, 117 F.Supp. 705 (D.C.D.C. 1953). It took only three years for this warning to become a mere echo. The Kansas Supreme Court said in 1956: "The concept of the terms public purpose, public use, and public welfare, as applied to matters of this kind, must be broad and inclusive. As community life becomes more complex and our cities grow and become overcrowded, the need to use, for the public benefit, areas which are not adapted to the pressing needs of the public, becomes more imperative." State v. Urban Renewal Agency of Kansas City, 179 Kan. 435, 296 P.2d 656 (1956). Last June the warning given in 1953 by a federal court had faded into oblivion as a state court said: "Condemnation of property nearly always results in some inconveniences to those whose property is taken but the test which we should and must apply is 'the greatest good for the greater number.'" Amsterdam Parking Authority v. Trevett, 174 N.Y.S. 2d 832 (N.Y. 1958).

[10] A leading case in this area and one that would seem to answer expressly the contentions of the appellant is the case of In re City of Rochester, 137 N.Y. 243, 33 N. E. 320 (1893). The New York legislature gave the City of Rochester the power to condemn land for a public park and to sell the land when it was no longer of any use. The contention there, as by appellants in this case, was that the sale made the taking for private purposes. The New York court said: "Of course the city could not take private property for the purpose of selling it or dealing in it; but having once acquired it for a park, and it becoming, in the course of time, unnecessary or useless for that purpose, by the growth of the city or other changes in the situation, a sale in the manner prescribed by the statute would be within the legitimate functions of the city as a municipal corporation, and power to that end, conferred at any time, or in the act authorizing the taking, cannot invalidate the taking, cannot invalidate the delegated right to exercise the power of eminent domain."

On the basis of the majority opinion, it is assumed that Mississippi will follow the trend in giving the broad meaning of public benefit to the words of the Constitution, "public use;" and that Mississippi will follow the other trend in holding that a provision for sale of the lands back to private persons for their profit does not affect the power of eminent domain if the initial taking is for the public use. It is submitted, however, that this case cannot be cited as authority for those propositions because the Court had no jurisdiction to rule on the question of public use. The majority opinion stated that according to Section 17 of the Mississippi Constitution, the question of public use is a judicial one. Justice Ethridge then stated for the majority: "We adjudicate here that the one-quarter mile perimeter area, if taken by eminent domain, will be for a public use. The undisputed evidence so shows." It is submitted that the statement was without the jurisdiction of the court because it amounted to a declaratory judgment. The procedure for judicially determining whether or not land to be taken by eminent domain is for public use is expressly set forth by statute.[15] That procedure was not followed in this case. The question of the use for which the lands are to be taken was not in issue,[16] yet the court ruled upon it. An earlier decision,[17] also written by Justice Ethridge, states: "That Sec. 2782 (of the Miss. Code Ann. (1942)) is an express statutory grant of power to the *circuit court* to test the question of public necessity, and to enjoin an eminent domain proceeding until the *circuit court* decides the necessity issue on the petition for writ of prohibition. ". . . We think that Code Sec. 2782 establishes the *exclusive remedy and tribunal* for determining the question of public necessity . . . . In brief, *there is no way to test judicially the issue of public necessity except by a petition for a writ of prohibition under Code Sec.* 2782." It is submitted that although the Court decided the case on a point not in issue and without its jurisdiction, the result reached in the noted case is in line with the trend in the United States today and has ample authority to support it. The mere fact that provisions are made for resale of lands condemned by eminent domain is not enough to extinguish that power because the taking is alleged to be for private use rather than for public use.

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[11] The Housing Authorities Act, Miss. Code Ann. § 7295 (1942), et seq., is similar to the urban redevelopment acts of other states. Note that Section 7300(d) expressly gives the authority the power to obtain land by eminent domain and subsequently to sell the property.

[12] Some courts have followed the thoughts of the court in Zurin v. Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945), and declared that slum clearance, per se, is for public benefit and use and that subsequent sale is merely an incidental private benefit. Other courts follow Rowe v. Housing Authority of City of Little Rock, 220 Ark. 698, 249 S.W.2d 551 (1952) and declare that the public benefit does not stop with the clearing of the slum but continues and encompasses the subsequent sale to private persons and to the improvements which they make—granted that they are made for private profit—upon the land. The same result is obtained with either approach.

[13] The courts have reached this conclusion generally throughout the United States since almost all resale provisions in an eminent domain statute permit the sale when the condemning agency feels that retention of the land is no longer for a public purpose. When the land acquired is no longer necessary for public use, the agency owning the land "may dispose of property which is acquired in fee . . . , without destroying the public nature of the original acquisition." Sanitary District of Chicago v. Manassee, 380 Ill. 27, 42 N.E.2d 543 (1942). See also: Papandinis v. City of Somerville, 331 Mass. 637, 121 N.E.2d 714 (1954); Belovsky v. Redevelopment Authority, 357 Pa. 329, 54 A.2d 277, 172 A.L.R. 953 (1947); Foeller v. Housing Administration of Portland, 198 Ore. 205, 256 P.2d 752 (1953); In re Slum Clearance in City of Detroit, 331 Mich. 714, 50 N.W.2d 340 (1951); Vilib v. Housing Authority of the City of Dallas, 287 S.W.2d 323 (Texas 1955); Schenider v. District of Columbia, 117 F. Supp. 705 (D.C.D.C. 1953); State v. Urban Renewal Agency of Kansas City, 179 Kan. 435, 296 P.2d 656 (1956); Murray v. La Guardia, 291 N.Y. 320, 52 N.E.2d 884 (1943); David Jeffery Co. v. Milwaukee, 267 Wis. 559, 66 N.W.2d 362 (1954); Wright v. Walcott, 238 Mass. 432, 131 N.E. 291 (1921); Driscoll v. New Haven, 75 Conn. 92, 52 Atl. 618 (1902); U.S. v. 243.22 Acres of Driscoll v. New Haven, 75 Conn. 92, 52 Atl. 618 (1902); U.S. v. 243.22 Acres of Land in Village of Farmingdale, 43 F.Supp. 561 (E.D.N.Y. 1942); People v. Chicago, 394 Ill. 477, 68 N.E.2d 761 (1946); Borek v. Galler, 74 N.Y.S.2d 675 (N.Y. 1958).

[14] Cincinnati v. Vester, 33 F.2d 242, (6th Cir. 1929); Truitt v. Borough of Ambridge Water Authority, 389 Pa. 429, 133 A.2d 797 (1957); State v. Superior Court, 325 P.2d 300 (Wash. 1958).

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[15] Miss. Code Ann. § 2750 (1942), establishes an eminent domain court. Section 2751 requires the agency having eminent domain powers to apply to the eminent domain court for exercise of the power. Those owning the property to be condemned are made parties defendant. Section 2756 requires a separate trial for each person if the property of more than one person is to be condemned. (Note that the principal case deals with Mr. Culley and Dr. Walker together and that the many others persons owning property in the five counties in which land is to be condemned are not even parties to this action—much less to the separate action to which they are entitled by section 2756). Section 2782 sets up the procedure for determining "whether there is a public necessity for the taking of the particular property or a part thereof which it is proposed to condemn." The cause is to be tried by the circuit judge in the circuit court after he has issued a temporary order stopping the hearings in the eminent domain court until this issue has been decided. Appeal may be made to the Supreme Court of Mississippi.

[16] The Chancellor in the lower court properly recognized the fact that the question of public use was not at issue and was not in his jurisdiction. In his opinion, which was dictated into the record, he said that the "objections (of the appellants) . . . made at this hearing are not as to the creation of the Pearl River Water Supply District itself. The objections go to the question, of course, of the value of the lands, and also the question of the taking of particular lands, whether the use for which such lands would be taken would be a public use, and as the Court sees it, that would be a judicial question to be determined in a court of eminent domain, and is not in issue in this proceeding."

[17] Erwin v. Mississippi State Highway Commission, 213 Miss. 885, 58 So.2d 52 (1952).

INCOME TAXATION — DISALLOWANCE OF PURCHASE OF LIQUOR AS A BUSINESS DEDUCTION

Appellee, an Oklahoma attorney, brought this action against the United States to recover excessive income tax paid, claiming a deduction for the purchase price of liquor bought for entertainment of clients and prospective clients in accordance with the usual practice in the locality. From an allowance of the deduction, the Commissioner appeals, not contesting the "ordinary and necessary" nature of the deduction,[1] but claiming that the allowance would be a severe and immediate frustration of the public policy of the state of Oklahoma.[2] HELD. Reversed. There was a severe and immediate frustration of the policy of a dry state, therefore the deduction of the cost of liquor cannot be allowed as an ordinary and necessary business expense. *United States v. Winters,* 261 F.2d 675 (10th Cir. 1958).

The Internal Revenue Code of 1954 states that "there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying out any trade or business."[3] Neither the 1939 Code or the 1954 Code has expressly proscribed or prohibited the deduction of any payment as a business expense on the ground that such payment was against public policy. Although the question of deductibility of expenses which violate a federal or state law was not in issue, the Supreme Court, in *Lilly v. Commissioner,*[4] recognized that such expenditures by virtue of their illegality might not be ordinary and necessary business expenses.[5] Also, in *Commissioner v. Heininger,*[6] it was recognized that the federal courts have narrowed the meaning of the language permitting the deduction of ordinary and necessary business expenses "in order that tax deduction consequences might not frustrate sharply defined national or state policies prescribing particular types of conduct." However, in a recent case,[7] the Supreme Court held that rent and wages paid in the operation of bookmaking establishments, though illegal under state law, were deductible as ordinary and necessary expenses.

In the noted case, the Court based its decision "on the fact that the liquor was possessed and used for business purposes."[8] It was not denied that possession of intoxicating liquor by an individual for his own personal use is not unlawful in Oklahoma.[9] Hence, it seems that "a personal use of alcoholic liquors for the gratification of social guests is in a different category from the business use of such liquors for the attainment of commercial objectives;"[10] this was possession of liquor for a purpose contrary to the Oklahoma Prohibition Ordinance and statutes.[11] The Court inferred[12] that the question to be determined in the instant case would be peculiar to the States of Oklahoma and Mississippi—these being the only so-called dry states. However, the applicable Oklahoma laws[13] do not ban the possession of liquor, as does Mississippi law.[14] Possession of liquor in Mississippi is illegal for any purpose, and it appears that an argument for deduction of the purchase price of liquor would be in vain in light of the principal case. It is significant, in the noted case, that there has never been a conviction reported for serving intoxicating liquor to business guests in one's own home in Oklahoma. Thus, it seems that the Court of Appeals, and not the State of Oklahoma, is determining what is against the public policy of the State of Oklahoma. This decision seems hard to rationalize with other decisions that have allowed deductions for expenses connected with illegal activities.[15]

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[1] Int. Rev. Code § 162 (1954).

[2] See note 11 infra.

[3] See note 1 supra.

[4] 343 U.S. 90 (1952).

[5] Accord: Boyle, Flagg & Seaman, Inc., 25 TC 43 (1955).

[6] 320 U.S. 467 (1943). See Comm'r. v. Doyle, 231 F.2d 635 (7th Cir. 1956), in which expenses for rent and wages incurred in the operation of an illegal gambling business in Illinois, which were themselves contrary to a sharply defined and declared public policy of that state, were deductible for income tax purposes as ordinary and necessary expenses, inasmuch as the statute makes no distinction between lawful and unlawful disbursements, and the expenses sought to be deducted were an integral part of the business. Accord: Louis Cohen, TC Memo 1958-67; George G. Elmer, TC Memo 1958-108. An interesting survey of the question in point can be found in Stapleton, The Supreme Court Redefines Public Policy, 30 Taxes 641 (1952).

[7] Comm'r. v. Sullivan, 356 U.S. 27 (1958).

[8] 261 F.2d 675, 678 (10th Cir. 1958).

[9] Dawson v. State, Okl. Cr., 273 P.2d 154 (1954).

L. T. Senter, Jr.

TORTS—MUNICIPAL CORPORATIONS—LIABILITY FOR INJURIES TO USERS OF DEFECTIVE SIDEWALK

Plaintiff-pedestrian sustained personal injuries in a fall on the depressed portion of a sidewalk, curb, and gutter. Defendant-city contends that pedestrian's own negligence contributed toward her injuries. It was a bright, clear day, but pedestrian failed to see a break in the curbing which had been there for several years. HELD: Affirmed. In absence of prior knowledge of defect in curb, pedestrian had a right to assume, and act upon the assumption, that the sidewalk was in a reasonably safe condition for travel. *Hunt v. Tooele City*, 334 P.2d 555 (Utah 1959).

Municipal sidewalks are intended for the public use, and a person without prior knowledge of a defect may assume and act upon the assumption that the municipality has fulfilled its duty of keeping the sidewalk in a reasonably safe condition.[1] However, responsibility for injury to a pedestrian exists only when a defective condition is dangerous, or calculated to do injury,[2] and when the city has actual or constructive knowledge of the defective condition.[3] After the lapse of a reasonable amount of time, knowledge is implied.[4] Although a person who has never been on the particular sidewalk should be somewhat more alert, a failure to do so would not constitute negligence per se.[5] A pedestrain must exercise ordinary care while using a public sidewalk, but this does not mean constant observation such as "keeping the eyes glued to the sidewalk."[6] An examination of case law in the United States indicates that the following are elements of "ordinary care:" A person must walk with his eyes open and observe his general course,[7] but mere abstraction or lack of attention to the condition of the sidewalk is not negligence;[8] One must have in mind that there exist irregularities brought about by natural causes such as rains, expansion, soil erosion, and tree roots.[9] Pedestrians are not required to watch every step,[10] nor to anticipate "traps" or defects,[11] but they must see what is obvious and apparent and what would be noticed by an ordinary prudent passerby.[12] However, if a person's attention is momentarily or temporarily diverted by reason of which he does not see the defect or obstruction in time to avoid it, he is not thereby precluded from recovery as a matter of law.[13] If a pedestrain looks toward and does not see, or should have seen a defect or obstruction, the authority is divided as to whether he is[14] or is not[15] guilty of contributory negligence. Should a person know of a defective or dangerous condition, he is not precluded from using a walk but he must look for such defect, and exercise such care and diligence as a prudent man would exercise in view of the danger.[16] A minority[17] of jurisdictions hold that this is assumption of risk and refuse to allow recovery.

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[10] 261 F.2d 675, 678 (10th Cir. 1958).

[11] 1 Oklahoma Statutes Ann. p. 929 (Oklahoma Prohibition Ordinance). 37 Oklahoma Statutes Ann. §§ 1, 31, and 50.1.

[12] 261 F.2d 675, 680 (10th Cir. 1958).

[13] See note 10 supra.

[14] Miss. Code Ann. § 2613 (1942).

[15] See note 6 supra.

[1] McGurk v. Shreveport, 2 So.2d 687 (La. 1941); Clinton v. West Monroe, 187 So. 561 (La. 1939); City of Decatur v. Gilliam, 222 Ala. 377, 133 So. 25 (1931); City of Jackson v. Clark, 152 Miss. 731, 118 So. 350 (1928); Jordan v. City of Lexington, 133 Miss. 440, 97 So. 758 (1923); Reinach v. San Francisco, 331 P.2d 1006 (Cal. 1958); Taverna v. City of Hoboken, 43 N.J. Super. 160, 128 A.2d 11 (1956); Taggert v. Kansas City, 156 Kan. 478, 134 P.2d 417 (1943); Watkins v. Town of Cicero, 312 Ill. App. 380, 37 N.E.2d 785 (1941); City of Tuscaloosa v. Fair, 232 Ala. 129, 167 So. 276 (1936); Kennedy v. City of Everett, 2 Wash. 2d 65, 99 P.2d 614 (1940); Tyler v. City of Richmond, 168 Va. 308, 191 S.E. 625 (1937); Gurney v. Rapid City, 74 S.D. 194, 50 N.W. 360 (1951); Bills v. Salt Lake City, 37 Utah 507, 109 Pac. 745 (1910).

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[2] James v. New Orleans, 121 So. 879, (La. 1923); Smith v. Krebs 166 Kan. 586, 203 P.2d 215 (1949); Miller v. New Orleans, 152 So. 141 (La. 1934).

[3] Cobb v. Town of Winnsboro, 49 So.2d 625 (La. 1950); Bodenheimer v. New Orleans, 18 So.2d 224 (La. 1944); Hattiesburg v. Reynolds, 124 Miss. 352, 86 So. 853 (1921); Birmingham v. Martin, 228 Ala. 318, 153 So. 235 (1934); Johnson v. City of Opelika, 260 Ala. 551, 71 So.2d 793 (1954); Loewen v. City of Burbank, 124 Cal. App. 2d 551 (1954); Louisville v. Verst, 308 Ky. 46, 213 S.W.2d 517 (1948); Ross v. Long Beach, 133 N.Y.S. 149 (N.Y. 1954); Knoxville v. Ferguson, 34 Tenn App. 585, 241 S.W.2d 612 (1951); City and County of Denver v. Dugdale, 127 Colo. 373, 256 P.2d 898 (1953).

[4] Baker v. Granite City, 311 Ill. App. 586, 37 N.E.2d 372 (1941); Billings v. Witchita, 144 Kan. 742, 62 P.2d 869 (1937); Mathews v. City of Richmond, 291 Ky. 387, 164 S.W.2d 968 (1942); City of Norman v. Sallee, 205 Okla. 1419, 238 P.2d 292 (1951).

[5] Clevenger v. Seattle, 29 Wash.2d 167, 186 P.2d 87 (1947); Ashley v. City of Aberdeen, 46 Wash. 385, 90 Pac. 210 (1907); Linquist v. Seattle, 67 Wash. 230, 121 Pac. 449 (1912); Bentley v. Rothschild Hat Co., 144 Mo. App. 612, 129 S.W. 249 (1910); McManus v. New Jersey Water Co., 22 N.J. 253, 91 A.2d 868 (1952); Blasick v. City of Yakima, 274 P.2d 122 (Wash. 1954).

[6] Weber v. Union Development & Construction Co., 118 La. 77, 42 So. 652 (1906); Lemoine v. City of Alexandria, 151 La. 77, 92 So. 58 (1922): City of Montgomery v. Ross, 195 Ala. 362, 70 So. 634 (1916); City of Decatur v. Gilliam, 222 Ala. 377, 133 So. 25 (1931); Peters v. San Francisco, 41 Cal.2d 419, 260 P.2d 55 (1953); Birdsong v. Clarksdale, 191 Miss. 532, 3 So.2d 827 (1941); Shepard v. City of Aurora, 5 Ill. App.2d 12, 124 N.E.2d 584 (1954); Batts v. City of Nashville, 22 Tenn. App. 418, 123 S.W.2d 1099 (1939); Kaznowski v. City of LaSalle, 316 Ill. App. 115, 43 N.W.2d 852 (1942).

[7] Hebenheimer v. St. Louis, 269 Mo. 92, 189 S.W. 1180 (1916).

[8] City of San Diego v. Perry, 124 F.2d 629 (9th Cir. 1942).

[9] White v. City of Alexandria, 216 La. 308, 43 So.2d 618 (1949).

[10] Lovins v. St. Louis, 90 S.W.2d 430 (Mo. 1936).

[11] Emmey v. Stanley Co. of America, 139 Pa. Supp. 69, 10 A.2d 795 (1940).

[12] Glatstein v. Shreveport 149 So. 158 (La. 1933); Massicot v. New Orleans, 43 So.2d 621 (La. 1950); McMurphy v. Pipkin, 260 Ala. 203, 69 So.2d 682 (1954); Woodson v. Metropolitan Street Railway, 224 Mo. 685, 123 S.W. 820 (1909); Kelly v. Kansas City, 153 Mo. App. 484, 133 S.W. 670 (1911); Anderson v. City of Wilmington, 70 Atl. 204 (Del. 1907); Learner v. Philadelphia, 221 Pa. 294, 70 Atl. 755 (1908); Glover v. City Council of Augusta, 83 Ga. 314, 63 S.E.2d 422 (1951); Belmont v. Isenhour, 249 N.C. 106, 105 S.E.2d 431 (1958); Russakoff v. City of Stamford, 134 Conn. 450, 58 A.2d 517 (1948); City of Louisville v. Verst, 213 S.W.2d 517 (Ky. 1948).

To impose upon a municipal corporation a duty of immediate repair of a slight defect in one of its sidewalks is to require the impossible. The rule today states that only sizeable and inherently dangerous defects require such attention. The requirement that the city be notified either by lapse of time or actual notice further limits its responsibility and keeps the rule within reason. The great weight of authority in the United States today gives a pedestrian the right to assume that municipal sidewalks are in reasonably safe condition. This is limited by the requirement of "ordinary care" and a duty to see the obvious. The noted case strengthens the pedestrian's position—holding that "looking at and failing to see" a defective condition is not necessarily contributory negligence but that the proximate cause was the negligence of the city in failing to keep its sidewalks in repair. The defect having been there "several years," the attempted but unsuccessful repair, and its latent dangerous qualities clearly demonstrates the negligence of the municipal corporation.

William H. Cox, Jr.

Torts—Owners And Occupiers Of Land—Classification Of Licensees And Invitees

Plaintiff's husband operates a cafe, service station, and tourist court on the south end of a large commercial lot which lies adjacent to and south of her home lot. The area of the commercial lot between the plaintiff's home lot and the business establishments is vacant and graveled. For five years prior to August 21, 1957, plaintiff frequently passed from her home to her husband's business establishment to assist her husband in his business endeavors, and during that time used a path which was noticeably well traveled from her house to the graveled commercial lot. With the permssion of plaintiff's husband, the defendants, on August 19, 1957, unloaded steel pipe in stacks two feet high on the vacant portion of said commercial lot. After dark, on August 21, 1957, plaintiff, while walking along the path to her husband's business establishments, fell over the stacked pipe, severely injuring herself. Mrs. Bishop charged the defendants with negligence for blocking the path and for failing to place warning rails and lights. The defendants demurred to the declaration. HELD: Demurrer sustained. No cause of action was stated since the plaintiff was a licensee, and the defendants, as occupiers of land, were not liable for ordinary negligence to a licensee. *Bishop v. Stewart,* 106 So.2d 899 (Miss. 1958).

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[13] City of Ashland v. Boggs, 161 Ky. 728, 171 S.W. 461 (1914); Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576 (1894); Chicago v. Babcock, 143 Ill. 358, 32 N.W. 271 (1892); City of Valpariso v. Schwerdt, 40 Ind. App. 608, 82 N.E. 923 (1907); Barry v. Terkildsen, 72 Cal. 254, 13 Pac. 657 (1887).

[14] Schlossberg v. Brugh, 167 Va. 49, 187 S.E. 487 (1936); Lane v. Dickinson, 276 Pa. 306, 120 Atl. 264 (1923); Bailey v. Columbia Grocery Co., 73 Ind. App. 58, 124 N.E. 784 (1919); O'Neill v. St. Louis, 292 Mo. 656, 239 S.W. 94 (1922); Donnelly v. Real Estate Management Corp., 342 Ill. App. 453, 96 N.E.2d 820 (1951); Welling v. City of Charlotte, 241 N.C. 312, 85 S.E.2d 379 (1955).

[15] MacLean v. San Francisco, 151 Cal.2d 133, 311 P.2d 158 (1957); Balcom v. City of Independence, 178 Iowa 685, 160 N.W. 305 (1916); White v. Harrisburg, 342 Pa. 556, 20 A.2d 751 (1941); City of Macon v. Stevens, 42 Ga. App. 419, 156 S.E. 718 (1931).

[16] Cloutier v. City of Owosso, 343 Mich., 238, 72 N.W.2d 46 (1955); Franklin v. Edwardsville, 4 Ill. App. 2d 495, 124 N.E.2d 357 (1957); Venturalli v. Chicago, 337 Ill. App. 283, 85 N.E.2d 352 (1949); Clark v. Joslin Dry Goods Co., 128 Colo. 317, 262 P.2d 546 (1953); Swenson v. City of Rockford, 9 Ill. App. 122, 136 N.E.2d 777 (1956); Baltimore v. Grossfeld, 173 Md. 197, 195 Atl. 554 (1938); El Paso v. Mendoza, 191 S.W.2d 102 (Texas 1946).

[17] Burcham v. City of Mullens, 83 S.E.2d 505 (W. Va. 1954); Prass v. Cincinnati, 98 Ohio App. 468, 129 N.E.2d 873 (1953); Allen v. Dillman, 249 S.W.2d 23 (Ky. 1952).

The sufficiency of the demurrer depended upon the Court's determination as to whether plaintiff was a licensee or an invitee when she fell over the stacked pipes. According to well established precedents, an owner or occupier of land violates his duty to an invitee when he negligently allows conditions to exist on his property which imperil the safety of persons upon the premises.[1] A licensor owes a licensee no duty except not to harm him willfully or wantonly.[2] An invitee is commonly defined as one who enters upon premises for the benefit of the occupier or owner.[3] One who enters upon land for his own convenience, pleasure, or benefit is classified as a licensee.[4] Mrs. Bishop's status cannot be included within either of these definitions, because it cannot be said that she walked into the pipe for the benefit of the defendants or for her own convenience, pleasure, or benefit.

The rising flood of tort cases in recent years has presented other situations in which the previously mentioned definitions of licensee and invitee do not apply to persons lawfully on the premises of another. Attempts to establish a supplementary standard which would separate licensees from invitees in such a way that would justify the higher duty of care to an invitee has resulted in the application of the doctrine of foreseeability. It is reasonable to foresee that an invitee is more likely to enter the premises than a licensee. It is also reasonable to say that one owes a higher duty to keep the premises in a safe condition for an invitee, who is more likely to come upon the premises, than to a licensee whose presence is not as probable. It has been submitted that the true test of a property owner's liability is not the nature of the landowner's conduct, but the existence of grounds for anticipating another's presence, so as to require the taking of reasonable precautions for his safety.[5] The degree of care that is reasonable is determined by the probability that a person will take a particular path,[6] at a particular time of day.[7] Firemen and policemen are universally held to be licensees, and yet they clearly come on the owner's premises for his benefit, and the invitation is clear since they come in response to his call for help. The distinction must be in the fact that firemen and policemen are likely to enter at unforeseen times, upon usual parts of the premises, and under circumstances of emergency where care in preparation cannot be reasonably anticipated.[8] In the *Kennedy* case,[9] a water meter inspector's recovery for injuries was based not only upon the ground that he was an invitee, but also upon the general ground of foreseeability of injury. An owner of unfenced land within 100 to 120 feet of a passing highway was not held responsible for the death of two children who entered the land and swam in a poisonous pool, because there was no reason to anticipate anyone swimming in the pool.[10] In the noted case, the Court concluded, after considerable difficulty, that Mrs. Bishop was a licensee since she used the path for her own convenience. It seems that the court could have more properly reached the duty of care owed Mrs. Bishop by examining the foreseeability that she would stumble upon the stacked pipe.

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[1] Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N.W. 99 (1922).

[2] Robinson v. Leighton, 122 Me. 309, 119 Atl. 809 (1923); Austin v. Baker, 112 Me. 72, 75 Atl. 1005 (1914); Stanford v. Clancey, 106 Me. 72, 75 Atl. 293 (1909); Fleckenstein v. Great A & P Tea Co., 91 N.J.L. 45, 102 Atl. 700 (1910).

[3] Prosser, Torts § 78 (2d ed. 1955).

[4] Bennett v. Louisville & N.R.R., 102 U.S. 577 (1880); Branan v. Wimsatt, 298 Fed. 833 (D.C. Cir. 1924); Brosnan v. Koufman, 294 Mass. 495, 2 N.E. 2d 441 (1936); Pettyjohn v. Basham, 126 Va. 72, 100 S.E. 813 (1919); Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1937).

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[5] 38 Am. Jur., Negligence § 104 (1958 supp.).

[6] Olderman v. Bridgeport City Trust Co., 125 Conn. 177, 4 A.2d 646 (1939).

[7] Morrison v. Carpenter, 179 Mich. 207, 146 N.W. 106 (1914).

[8] Sherman v. Maine Cent. R.R., 110 Me. 228, 85 Atl. 755 (1913).

[9] Boneau v. Swift & Co., 66 S.W.2d 172 (Mo. 1934); Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 N.W. 2d 549 (1951).

[10] Kennedy v. Heisen, 182 Ill. App. 200 (1913).

RECENT BOOKS

THE LION AND THE THRONE

The Life and Times of Sir Edward Coke (1552-1634).
By Catherine Drinker Bowen. Boston: Atlantic-Little, Brown.
1957: $6.00: pp. 652

An objective observer from outer space must certainly be struck by the mundane experiences of our contemporary materialism and especially the frequent preoccupation of our calling with the inadequacies or excess of the "adequate award." It is, therefore, a refreshing opportunity to disgress and look again at the fascinating period of legal history covered by "The Lion and the Throne."

Here we find the romantic adventure that was the life of Sir Edward Coke unfolded in lively narrative. A man successively Attorney General, Speaker of Commons, Chief Justice of the Common Pleas, and Chief Justice of the King's Bench during this formative period of the common law certainly merits our careful consideration. In this delightful biography we relive his preparation for the law, his remarkable success in private practice and his rapid rise in public office. We learn of his spirited struggles with the Crown, his courtships, his successively happy and disastrous marriages, his constant rivalry with Bacon, his keen interest in legal scholarship, his influential literary legacies, and his untiring work as elder statesman in Parliament during his twilight years.

The biography of this trial lawyer who was also an advocate in Shelly's Case and prosecutor in the celebrated treason trials of Raleigh, Essex, and the conspirators in the Gunpowder Plot, is bound to be of interest to the lawyer of today. Without antiquarian inclination one can yet enjoy a rewarding experience in revisiting this tumultuous period. The timeless struggle of the Individual vs. the State that gives us such concern today was never more real than during this period of conflict over the royal prerogative and supremacy of the common law.

We can marvel along with future generations that this stalwart barrister could courageously stand up against a totalitarian monarch and defiantly quote the ancient learning of Bracton: "non sub homine, sed sub Deo et Lege"—not under man but under God and the Law.[1] In our own time when conformity seems to be regarded as such a virtue, we can yet pause for a grateful moment to recognize the integrity and independence of this lawyer who subordinated his personal interests to higher goals. Whatever else might be said, his was not a philosophy of expediency.

Edward Coke has long been recognized as one of the truly great men of the law. Yet he had his full measure of human failings, and there are periods in his life as well as particular courses of conduct that we cannot admire. As one eminent scholar has summarized Coke's place in legal history:

"Full of patriotism and national pride, Coke shared the feelings

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[1] Page 305.

> of others of his contemporaries who exalted the idea of the State, and displayed a violent hatred of Roman Catholics and political prisoners. Even contemporaries sometimes felt that he exaggerated a little, while his prosecution of Raleigh overstepped all bounds and was conspicuous among the State trials even at this period for its brutality . . . . His general influence upon the course of English law was to maintain continuity between modern and medieval times, and this achievement had vices as well as virtues. But, most important of all, he preserved the fabric of the common law, and in his judgments began the tendency towards bringing it into harmony with more modern needs."[2]

Fortunately, Catherine Drinker Bowen does not idolize her subject but faithfully records the bitter with the sweet. She paints a remarkably detailed picture of a great man and breathes life into him as a human being, full of drive and ability, sometimes misguided, sometimes afflicted with acute astigmatism towards the viewpoints of others. One wonders that a lawyer so steeped in the traditions of the adversary system of the common law, in considering two or more sides of an issue, could yet so completely close his mind on questions of politics and religion. Perhaps we do the man an injustice to expect more of him, however, and to judge him by later standards of enlightenment.

The author of this work has performed an admirable task of research and scholarship. Footnotes documenting the text cover more than a hundred pages at the end of the book. Not content merely with the reports of others, Mrs. Bowen visited England to examine many original sources and records. She visited the Inns of Court, Westminster Hall, and places in the countryside frequented by Coke to collect firsthand information for this book. More than six years were consumed in its preparation.[3]

Mrs. Bowen is not a lawyer but has written two earlier and highly successful biographies of great men of the law—"Yankee from Olympus" (on Justice Oliver Wendell Holmes) and "John Adams and the American Revolution." She has handled the technical phases of these works with remarkable skill.

If one wonders how this Pennsylvania housewife should move backward through legal history from Holmes to Adams to Coke, she gives us a ready answer. She first became interested in government and the Constitution and was directed to the life and writings of Justice Holmes. In tracing the heritage of Justice Holmes, she was led back to the American Revolution and its issues of justice and individual liberty, from all of which came the John Adams book. That trail naturally took her thence to England and our heritage of the common law.

In her own words she tells us how she chose Coke from among the many figures of English common law:

> "Coke's name presented itself quite naturally as a rounding out, carrying the story of our form of free government back to Eng-

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[2] Plucknett, A Concise History of the Common Law (2nd Ed. 1936) pp. 217, 219.

[3] The New York Times, March 10, 1957, § 7, p. 1.

> land, where it had its inception . . . . Sir Edward Coke never set foot on American soil. Yet no United States citizen can read his story without a sense of immediate recognition. In these parliamentary struggles, knights, citizens and burgesses fought not for themselves alone but for states as yet unformed: Pennsylvania, Virginia, California. In Westminster courtroom battles over procedure, jurisdiction, 'right reason and the common law,' constitutional government found its way to birth. When the time came we changed the face of this English constitution; amid the sound of guns, we repudiated what we hated, adapted what we liked. Yet the heritage endured."[4]

While one can enrich his appreciation of this great heritage in reading such a biography, the reader need not be discouraged about the prospect of difficult or ponderous reading. Mrs. Bowen's style is light and readable. Her descriptions are not burdened with irrelevant details. Better than most fiction are her accounts of the courtships of Coke and his rivalry with Bacon for the hand of the charming Lady Hatton, beautiful, young, rich, available widow.

Without reservation I can heartily recommend this fine work to all of the Mississippi Bar who seek a better understanding of our heritage in the common law of our English cousins.

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[4] Preface, pp. ix, x.

FEDERAL TAX FRAUD LAW

By Ernest R. Mortenson, Indianapolis, Ind.:
The Bobbs-Merrill Co. Inc. 1958. pp. 295. $12.50

The reviewer recommends this publication as an absolute "must" for all general practitioners. Not since Stanley and Kilcullen wrote *The Federal Income Tax,* has a treatise on any phase of tax law been so clearly and so simply written. The points brought out by the author should be clearly understood by anyone with a general legal background even though he may be completely lacking in technical accounting knowledge. Furthermore, the subject is one which the general practitioner can no longer ignore. While the accountants may handle the accounting phases of income tax reporting, they are neither qualified technically nor legally allowed to handle those cases where the federal government asserts an intent on the part of the taxpayer to defraud the government of its just revenues.

This is the age of taxation, particularly taxation of incomes. With the constantly increasing scope and magnitude of federal government operations, and the incessant search for more revenue with which to support them, the rates of tax upon incomes have risen so steeply that citizens have occasionally resorted to questionable tactics in reporting their net taxable income to the Internal Revenue Service in order to reduce the amounts payable. Sometimes these tactics are deliberate attempts to falsify the correct amount of income receipts or allowable deductions therefrom, but often are actually practices which, in business transactions, are considered ordinary and normal under the well-established rule of "caveat emptor" which prevails therein. In any case, however, the natural desire of the revenue collecting agencies to increase their production has led to a much closer scrutiny of income tax returns and a growing attempt on the part of government agents to penalize questionable failures, to correctly report income and deductions, and to prosecute taxpayers criminally wherever it appears that the government has any chance of success. The income tax fraud statutes, which at the time of their original passage by Congress were actually intended to be used only against racketeers and other known criminals, have now become one of the government's foremost weapons in the collection of its revenues. Every lawyer, regardless of his preference as to type of practice, is now faced with the probability that he will be forced many times in his career to defend a client against a charge of tax fraud, thus he must at all times be sufficiently aware of the possibilities of a tax fraud charge as a consequence of the performance of ordinary legal matters. The general practitioner should know when to associate some other attorney who has the advantage of specialized training in this field.

The author points out in his introductory chapter that experienced legal counsel is not only desirable but often necessary at the very beginning of a tax investigation where there is the slightest possibility of any misunderstanding as to the client's intent as shown by his income tax report. He shows the many different avenues by which the government may obtain information or evidence of a fraudulent action and the fine line which often separates the assertion of an ordinary tax deficiency from a charge of fraud. Throughout this chapter and the remaining nine chapters of the book, he assumes that the reader is a general practicing attorney with very little knowledge of, and a great distaste for, the technical aspects of income tax practice. Consequently, the author words his statements in such a manner that such lawyers may clearly understand the principles set forth.

The substantive content of the book is set out in the best possible sequence. Chapter Two covers the manner in which a tax fraud case is developed. Mr. Mortenson illustrates how fraud cases may originate through routine investigations, information of other government agencies, or from informers; how the investigations are made when fraud is suspected, and the agencies which handle a case up to the point of actual criminal indictment, or the assertion of a 50% fraud civil penalty. Some of the pitfalls into which a taxpayer may be trapped are brought out by a hypothetical fraud case in simple, clear, and precise language, with schedule illustrations inserted for explanation.

In the next chapter, the author goes into detail regarding the question of cooperation with the government's agents. The rights and privileges of the taxpayer against forced cooperation and the possible waiver of such privileges are discussed along with the authority of the government agents to compel testimony and the production of records. As the criminal aspects of a fraud case cannot be compromised by mere payment of the taxes and civil penalties, and since the Treasury Department has abandoned the old rule regarding a voluntary disclosure of tax evasion activities, there is a real need for proper representation.

The next chapter deals specifically with the actual criminal sanctions. The author gives a lucid explanation of the elements necessary to support a fraud charge, and shows the application of these elements in various factual situations. He brings out the fact that there are several different penal provisions in the Internal Revenue Code, and that a taxpayer's conduct may constitute a violation of one sanction where it is not sufficient to be a violation of another. The difference between the felony statute and the misdemeanor statute and how the distinctions might be used to a defendant's advantage are discussed. In addition, there is an ample discussion of conspiracy and the periods of limitation on criminal prosecutions.

Chapters Five and Six are concerned with questions of evidence in tax fraud cases. These chapters are particularly important since some of the types of evidence used in tax cases may seem, to a general practitioner unfamiliar with them, to be almost beyond the bounds of comprehension. For instance, use of the net worth method, the expenditures method, the bank deposits method, and occasionally any combination of the three, do not seem in any way to comply with the requirements of the Internal Revenue Code for determining taxable income for a particular year for which the tax rate is to be levied. Furthermore, as the author shows, a change by the Commissioner in the taxpayer's method of accounting will often indicate a substantial deficiency where actually none exists. Nevertheless, these types of indirect proof of taxable income are accepted as sufficient to sustain a conviction of fraud even though they are susceptible to many miscalculations. Mr. Mortenson's discussion of them, which includes the quantum of proof and the question of corroboration of the calculations is well stated, and easily understood. In these chapters he also gives a clear explanation of the quantum of proof required and of specific evidentiary problems in tax cases—including official documents, book and records, the use of work papers, charts and summaries, and even of the occasional use of the taxpayer's spouse as a witness, directly or indirectly.

Chapter Seven deals with the framework of a criminal tax trial, including all of the procedural aspects, both before, during and after the trial. There is an excellent discussion of the problems surrounding the question of trial by jury and its desirability.

The outline of an actual trial of a criminal tax case is contained in Chapter Eight, together with a particularly fine discussion of the accountant's role during a trial. The author not only shows generally how the accountant may assist the defense attorney, but even lists ten specific questions to which the accountant's attention should be directed—which would be of great help to the attorney. The order of proof in a fairly characteristic net worth case is listed numerically for the reader's attention and many excerpts of testimony based on hypothetical cases are included.

In Chapter Ten the civil penalties are well covered, with a clear distinction being drawn between the civil fraud penalty and those for negligence, failure to file a return, failure to estimate or pay estimated tax, and for failure to collect and pay over tax as required by statute. Since these are the problems with which the average attorney will deal practically all of the time, this is the longest chapter in the book, and it contains a very clear and concise explanation of the indicia of civil fraud and the defenses against a charge thereof.

The author concludes his treatise with a chapter on collection procedures showing the rights of the government to proceed against property of a delinquent taxpayer either by summary procedure or by civil process in the district court. The methods of contesting assessments, injunctive relief and compromise offers, as well as the general procedural method of appeal from the lower courts are discussed. In addition, there are nine paragraphs dealing with the procedure for making refund claims for overpaid taxes. While Mr. Mortenson's coverage of the various general rules dealing with tax fraud cases is comprehensive, this book is not intended to be used as a sole source of information for those attorneys dealing with tax fraud cases, but could be used for preliminary research. Every paragraph dealing with a subject is well documented with citations to the leading cases on that particular point, and the references to the Internal Revenue Code and Criminal Code Sections on both substantive and procedural matter are invaluable. Despite the fact that this reviewer has had specialized training in this field, this book will occupy a favored position for quick reference in the future.

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TIMBER AND FOREST PRODUCTS LAW

By: Harry W. Falk, Jr.—Berkeley, California
Howell-North. 1958. $7.50. pp. 348.

The timber and forest products industry in the State of Mississippi has increased in the past few years to the point where it is now the leading income producing industry. This rapid growth to the number one spot can not be expected to taper off, and most people in the industry believe it will continue to rise in importance. As the industry increases there is an increasing need for competent legal advice. With this thought in mind, I recommend this book as truly a time saver.

This book was over ten years in preparation. There is only one other book on this subject, and that was published over thirty years ago. This publication cites and analyzes *all* post World War II cases involving the subject; *all* annotations on the subject in ALR; *all* articles published since 1925 in all American legal periodicals. There are over thirty-five Mississippi cases cited—through 98 So.2d 122 (Nov. 11, 1957). The author does not merely give the syllabus notes of cases but analyzes them and after so doing does not hesitate to disagree and give his reasons. The index of this book is excellent, and certainly in the legal profession quite often the index is the most valuable part of a book.

There are twenty-four chapters in this book, some of which would be of special interest and apply primarily to loggers, manufacturers, foresters and tree farmers. However, the balance of the book is of special interest to the practicing attorney. One chapter outlines the special rules of law for timber and forest products within each state. There are four chapters concerned with damages arising from timber operations which will enable the attorney to accurately determine the the amount of damages in a given case through presentation of the legal principles involved with terminology of the forester or layman. In this era of Government control and taxation, the chapters in the book pertaining to these subjects will be extremely helpful.

Almost half of the book is devoted to the meaning and interpretation of timber contracts and the terms used therein. The author does not conclude the book with a set of forms applicable only to his home state as is so often found. Instead, he provides the attorney with an entire chapter devoted to a check list of contract provisions. From this check list the attorney can protect the interest of his client and adapt contracts that will cover the situation at hand whether he be drafting the contract or approving one drafted by another.

In this day of increased timber importance, the practicing attorney will have timber problems, and the time saved through the use of this book as a complete and ready reference will more than pay for the book on its first use.

The author says, concerning the purpose of his book, "Few attorneys know much about timber, and few people dealing in timber or other forest products know much about law. This book is designed to breach the gap and permit both to better cooperate with each other." In my opinion his purpose was accomplished.

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FOREWORD

With the tremendous expansion, in the past three decades, of law both in quantity and complexity, stimulated successively by the Depression, World War II and inflated prosperity—all three of which have evoked attempted solutions in more regulatory measures, state and federal law schools have sought to keep pace by expanded curricula and post-admission education through conferences and institutes. In the emphasis on new subjects, in the fields of Labor, Oil and Gas, Taxation, Administrative Law, Credit Transactions and Corporate Finance, to mention a few, we are prone to give less time and thought to the older procedure, of which, we in Mississippi, have retained possibly more than our just share. We somehow tend to believe there is no need to grease the rear wheels on the assumption that if we make the front wheels go, the rear will be bound to follow.

The December issue of 1952 (Vol. XXIV No. 1) is a Symposium on Mississippi Writs. This number may be considered a sequel rounding out our basic procedure both in law and equity. To be complete, a treatment of practice in the circuit court should contain a dissertation on *Counter-Claims* but since this subject is so ably discussed by Hon. Joe H. Daniel in the May issue of 1954 (Vol. XXV No. 3, page 254) it is not repeated but is incorporated by this reference. So much for belatedly greasing the rear wheels.

Ordinarily the JOURNAL is restricted to quarterly publication by budget considerations as well as lack of summer editoral man-power. Last summer an extra issue annotating the Rules of the Supreme Court was made possible. The encouragement received from the Mississippi State Bar has enabled us to make this supplementary publication. We hope this second extra effort will be equally appreciated.

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Mississippi Law Journal

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VENUE AND JURISDICTION IN THE CIRCUIT COURT

*Vardaman S. Dunn**

I. GENERAL DISCUSSION

A. Scope of Article

The general statute applicable to actions in the circuit court is the basis of the discussion under this subdivision.[1] It does not include, except where analogous, the subject of venue and jurisdiction in the chancery court, justice of the peace courts and special tribunals, or under special statutes dealing with particular actions, suits or proceedings which are otherwise provided for.[2]

B. Definition of Terms Used

In order to avoid confusion and repetition, terms used herein are defined as follows:

Venue: Has reference to the permissible place of commencing and maintaining suit, as distinguished from jurisdiction of the subject matter.

Local Defendant: Means a defendant, individual or corporate, domiciled or residing in the county where the suit is commenced and sought to be maintained.

Non-local Defendant: Means a defendant, individual or corporate, not domiciled or residing in the county where the suit is commenced and sought to be maintained.

Foreign Defendant: Means a defendant, individual or corporate, who is a non-resident of the state.

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[1] Miss. Code Ann. § 1433 (1942).

[2] Except where otherwise provided, actions on the law side of the county courts of which the circuit court has concurrent jurisdiction, are controlled by the circuit court venue statutes; those on the chancery side by the chancery venue statutes. Miss. Code Ann. § 1606 (1942).

C. CONSTRUCTION OF STATUTES

With few exceptions, the statutes fully cover the subject of venue, and the common law rules have no application.[3] The legislature, so long as it does not unreasonably discriminate between litigants or classes of litigants, is the sole judge of the venue of actions and may fix it in one or more places according to its judgment of convenience and justice.[4] The statutes have been construed reasonably and without any tendency on the part of the court toward that strictness of interpretation so often found in connection with procedural acts, but due regard has been given to legislative intent and sound justice.

D. THE GENERAL STATUTE

The general statute that controls the venue of a vast majority of cases in the circuit court provides as follows:[5]

> "Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of they may be found, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue except where otherwise provided, and except actions of trespass on land, ejectment, and actions for the statutory penalty for cutting and boxing trees and firing woods and actions for the actual value of trees cut which shall be brought in the county where the land or some part thereof, is situated; but if the land be in two or more counties, and the defendant resides in either of them, the action shall be brought in the county of his residence, and in such cases, process may be issued against the defendant to any other county. If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, or if a public officer be sued in any such action, out of the county of his household and residence, although a surety or sureties, or some sureties,

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[3] Also, the rule is that where a special statute deals with a special or particular subject, the special and particular statute controls over the general venue statute. See Price v. Price, 202 Miss. 268, 32 So.2d 124 (1947). More or less comprehensive statutory venue provisions have been in existence in the state from the earliest times. The statute in the form found in the Code of 1930 was enacted in 1918 (Miss. Laws 1918, c. 149) to insert the clause providing for venue of actions against domestic corporations and making special provisions for public officers. In 1940, the statute was amended to add a provision covering public officers, but otherwise it remained the same (Miss. Laws 1940, c. 248). With the substantial re-enactment of this statute, legislative sanction has been given to the judicial interpretation prior to 1940.

[4] Clarke v. Louisville & N. R. Co., 158 Miss. 287, 130 So. 302 (1930); Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887 (1930).

[5] Miss. Code Ann. § 1433 (1942). Special statutes control over the general statute. Price v. Price, 202 Miss. 268, 32 So.2d 124 (1947). In rem actions, other than those specified, are excluded. See Eaton v. Hattiesburg Auto Sales Co., 151 Miss. 211, 117 So. 534 (1928).

on his bond, or other joint defendant, sued with him, be found or be subject to action in such county, the venue shall be changed, on his application, before the jury is impaneled, to the county of his household and residence, whether such suit is filed before or after such officer's term of office has expired."[6]

E. Limitation of Statute — In General

By its express terms the general statute is limited to "civil actions[7] of which the circuit court has original jurisdiction." Thus, it is held that the statute has no application whatever to causes of action within the jurisdiction of justices of the peace; so a public officer, sued in a justice court, is not entitled to invoke the statute on appeal.[8] However, the express limitation must, of course, give way to special conformity statutes by which the general circuit court act is expressly made to control.[9]

II. TIME FOR FIXING VENUE

The venue statute provides that actions shall be "commenced" in certain designated places. Another section of the code provides that "an action shall, for all purposes, be considered to have commenced and be pending from the time of the filing of the declaration, if a summons shall be issued thereon for the defendant, and, if not executed, other like process, in succession, may be issued, in good faith, for the defendant."[10] Another section provides for the issuance of alias, pluries and testatum writs if the original process be returned "not found."[11]

Accordingly, venue is fixed as of the commencement of the action and not necessarily when process is served. Thus, where the declaration is filed against a defendant domiciled[12] at the time in the county where suit is instituted, the territorial jurisdiction of the court immediately attaches, subject to the issuance in good faith of process,[13] and it may not be defeated by the act of the defendant in changing his domicile and moving out of the county before process can in due course be served upon him.[14] The plaintiff in such cases may have a testatum writ [15] or in some instances an attachment.[16]

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[6] Miss. Laws 1940, c. 248, re-enacted the statute exactly as it appears in the Code of 1930, with the addition of the phrase: "whether such suit is filed before or after such officer's term of office has expired."

[7] For distinction between civil and criminal actions, see Annot., 102 A. L. R. 397 (1936). See, also M. &. O. Ry. Co. v. State, 51 Miss. 137 (1875).

[8] Womack v. Richardson, 168 Miss. 748, 151 So. 175 (1933). See Yalabusha County v. Carbry, 6 Miss. 529 (1844), involving an appeal from a police court, wherein the same result was reached.

[9] For example, the venue in actions in the county court of which the circuit court has concurrent jurisdiction (Miss. Code Ann. § 1606 (1942), and, in certain features, chancery suits (Miss. Code Ann. § 1276 (1942); Griffith, Mississippi Chancery Practice § 158 (2d ed. 1950)), are controlled by the circuit court act. In chancery generally, different venue provisions apply. Brashier v. O'Connor & Sons, 181 Miss. 872, 180 So. 67 (1938); McRae v. Ashland Plantation, 187 Miss. 350, 192 So. 847 (1940).

[10] Miss. Code Ann. § 1463 (1942). This statute is expressly limited to actions in the circuit court and applies unless otherwise provided.

[11] Miss. Code Ann. § 1850 (1942).

[12] Excepting domicile, the defendant must be found by service of process.

III. CLASSES OF LITIGANTS COMPARED – IN GENERAL

Three classes of litigants are expressly dealt with in the general statute: (1) individuals, (2) domestic corporations, and (3) public officers, and except as to local actions, the rights and liabilities vary. The classification has been sustained against constitutional objections.[17] Actions are classed as either transitory or local, depending upon the subject matter.[18]

IV. TERRITORIAL JURISDICTION – IN GENERAL

Generally speaking, an action may be commenced in any county where any proper party defendant may be found. If process is served upon a defendant so found, the court is said to acquire territorial jurisdiction and process may issue to any other county for a joint party defendant.[19] On such state of the record the court may proceed to a determination of the action, unless it is divested of venue by the assertion on behalf of a party entitled thereto of the right of removal. On the other hand, if no proper party defendant is found and served within the county by one of the methods authorized by law, service of process upon a nonlocal defendant, regardless of his classification, will not vest the court with territorial jurisdiction, and a default judgment based upon the ineffective service is voidable, if not void.[20] The defendant, or defendants, in such case may take either of three courses of action: (1) he may appear and obtain a change of venue, if he is one of a class authorized to assert the right of removal,[21] (2) he may suffer judgment by default and thereafter appeal directly[22] or (3) he may suffer judgment by default and thereafter set it aside in a collateral attack, as by proceeding to quash a writ of execution issued thereunder.[23] On the other hand, territorial jurisdiction may be waived by the entry of a general appearance and by pleading to the merits.

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[13] Miss. Code Ann. § 1463 (1942).

[14] Andrews v. Powell, 41 Miss. 729 (1868).

[15] Miss. Code Ann. § 1850 (1942). Andrews v. Powell supra note 14. An instance of this type will rarely arise. Should it arise, the case cited should be consulted for the form and showing necessary for the testatum writ. An order of court is necessary to support the testatum writ and a showing and record must be made of the facts of removal of the defendant after commencement of the suit.

[16] McNair v. Kaiser, 62 Miss. 783 (1885).

[17] Pan American Petroleum Corp. v. Pate, 157 Miss. 822 (1930) (officers); Morrimac Veneer Co. v. McCalip, 129 Miss. 671, 92 So. 817 (1922) domestic corporations): Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887 (1930), citing Power Mfg. Co. v. Saunders, 274 U. S. 490 (1927), and Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 49 A. L. R. 713 (1926) (foreign and domestic corporations); Clarke v. Louisville & N. R. Co., 158 Miss. 287, 130 So. 302 (1930) (foreign corporations—railroads).

[18] See Subdivision VIII.

[19] Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874 (1927); Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931), and cases cited throughout this article.

[20] Perry v. Nolan & Maris, 159 Miss. 384, 131 So. 252 (1930); Cook v. Pitts, 111 Miss. 893, 74 So. 777 (1917); Campbell v. Triplett, 74 Miss. 364, 20 So. 844 (1896); Wooley v. Bowie, 41 Miss. 553 (1867); Pate v. Taylor, 66 Miss. 97, 5 So. 515 (1889); Spain v. Winter, Walk. 152 (Miss. 1824); McLeod v. Minor, 42 Miss. 517 (1869); Bank of Vicksburg v. Jennings, 5 How. 425 (Miss. 1841); Andrews v. Powell, 41 Miss. 729 (1868).

V. WHERE DEFENDANT FOUND

A. Classification of Litigants

The general statute is mandatory in requiring that suit "shall be commenced in the county in which the defendant or any of them may be found." Provisions for domestic corporations are also found in this statute. Generally speaking, an individual, regardless of his class may be found in any county in which he is physically present for the service of process or in the county of his household and residence. A domestic corporation may be found in the county of its domicile or where the action accrues. Foreign corporations that have qualified to do business in the state, although not expressly included within the statute, may, by analogy, be found in its established Mississippi domicile or where the cause of action accrues. Foreign corporations that have not qualified may, by reference to another section of the code, be found wherever it has an agent subject to process. Once found a defendant may or may not be entitled to a removal of the action to another county, depending upon the class to which he belongs and the circumstances. All of these matters are later developed at some length in this article. The discussion under the present heading excludes the question of the maintenance of venue by the joinder of a local co-defendant. It has to do only with the circumstances under which a defendant may be found so as to confer venue upon the court by service of process upon him, and without regard to any possible removal rights.

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[21] In Cook v. Pitts, 114 Miss. 46, 74 So. 777 (1917), it was held that the defendant might obtain a change of venue to the county of his domicile.

[22] Andrews v. Powell, 41 Miss. 729 (1868), holding that where process is served on the only defendant, an individual, in a county other than that in which suit was commenced, it will not be presumed in aid of a court of general jurisdiction that the defendant was domiciled in the county when suit was commenced, but the cause will be reversed. Wooley v. Bowie, 41 Miss. 522 (1867) (reversed and dismissed).

[23] In Perry v. Nolan & Maris, 159 Miss. 384, 131 So. 252 (1930), the question arose at a subsequent term in a proceeding by the defendant, against whom a default judgment had been entered, to quash a writ of execution issued under the judgment and to vacate the judgment as utterly void. On appeal from the action of the lower court in denying the relief sought, the cause was reversed. It was held that "the judgment was voidable, if not void, in this state of the record. . . . [T]he court had no jurisdiction" over the defendant.

B. Individual Defendants — Where Found

An individual defendant may be found in either one of two places. He may be found in the county of his domicile wherein he maintains his usual place of abode,[24] since, if he is not physically present, jurisdiction may be obtained by secondary service;[25] or in the county where he is served personally with the process of the court, provided that he is served while physically present within the territorial boundaries of the county where the suit is pending and provided further that his presence is not the result of fraud or improper device chargeable to the plaintiff. He may not be found elsewhere.[26]

C. Fraudulent Device in Finding Defendant

Omitting for the present the question of fraudulent joinder of parties, attention is here focused upon the subject of venue or jurisdiction where the element of fraud appears in finding the defendant in the county where suit is pending.

The statute merely fixes the venue in the county where the defendant is found. It would follow that insofar as the statute is concerned jurisdiction would not be affected by the method employed in finding the defendant. However, where fraud appears the court is vested with powers wholly independent of statute. Thus, it is held that a court will not take jurisdiction in a civil case based on a service of process on a defendant who is brought within the reach of its process wrongfully, fraudulently, by deceit or any other improper device; provided that the wrongful conduct is chargeable to the plaintiff.[27] The rule is based not on a lack of jurisdiction but on the view that it is improper for a court to exercise a jurisdiction so obtained. Such conduct amounts to a fraud upon the defendant and upon the jurisdiction of the court.[28] On the other hand, a defendant may voluntarily submit to the jurisdiction of the court by entering the county for the sole purpose of receiving process; but where collusion between the plaintiff and the appearing defendant is involved, jurisdiction so obtained will not extend to a joint defendant.[29]

D. Domestic Corporations

While in some respects foreign corporations are governed by the same rules, the subject discussed in this and immediately succeeding sections is restricted to purely domestic corporations.

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[24] Individual domicile is discussed later. See subdivision VI G.

[25] Miss. Code Ann. § 1859 (1942).

[26] See note 20 supra.

[27] Nicholson v. Gulf M. & N. R. Co., 177 Miss. 844, 172 So. 306 (1937); McRae v. Ashland Plantation Co., 187 Miss. 350, 192 So. 847 (1940).

[28] Nicholson v. Gulf M. & N. R. Co., supra note 27.

[29] Ibid.

The general statute provides specially for service on domestic corporations as follows: ". . . and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue except where otherwise provided . . . ."

It is quite clear from the statute itself that a plaintiff has the privilege of commencing his action and maintaining venue against a domestic corporation either in the county of its domicile or where the cause of action may occur or accrue. In other words, such defendant may be found within the meaning of the statute in either of the places mentioned.[30] But there remains yet to be solved, by reference to the decisions, several troublesome questions. They are those which relate to the exclusiveness of the enumerated places, to location of the corporate domicile and to the place where a cause of action may occur or accrue.

(1) *Exclusiveness of Specified Counties*

Despite the loose dictum to be found in some of the decisions indicating a contrary view,[31] it is now well settled that a domestic corporation may be found in no other county save that of its domicile or where the cause of action may occur or accrue. Thus, it is held that a domestic corporation may not be found for venue purposes in a foreign county merely by reason of the fact that its agent is physically present or residing therein, or that it is there exercising its franchise by conducting a branch of its business in charge of its agents.[32] In this respect venue of the domestic corporation differs from that of a non-qualified foreign corporation.

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[30] Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931); Batson & Hatten Lumber Co. v. McDowell, 159 Miss. 322, 131 So. 880 (1931); Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907 (1916).

[31] See Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920) and comment upon that case in Dean v. Brannon, 139 Miss. 312, 104 So. 173 (1925).

[32] Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907 (1916). It is interesting to note that this case was decided under tthe provisions of the Code of 1906. At that time, the general circuit court venue statute (Code 1906, Sec. 707) did not mention a corporation but laid the venue as to all defendants in the county where found. The result was reached by reference to the code section (Code 1906, Sec. 3932) which is now Miss. Code Ann. § 1866 (1942), having to do with process generally. The court concluded that the legislative intent was to place the venue of domestic corporations in the county of its "principal place of business," which was held to be synonomous with "domicile." It was reasoned that the legislature intended to grant immunity from the expense and inconvenience which would result from the sending of the corporate records and witnesses to distant counties and to compensate for the denial of the right of removal accorded only to individuals. See also: Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887 (1930); MeLeod Lumber Co. v. Manassa Lumber Co., 180 Miss. 552, 178 So. 83 (1938); Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931).

(2) *Location of Corporate Domicile*

Like an individual,[33] a domicile is imposed upon a domestic corporation at birth. One section of the code chapter on corporations[34] requires a specification of domicile to be included in the charter. Another section[35] requires that every domestic corporation maintain an office in the county of its domicile in charge of some officer or a designated resident agent upon whom process may be served, and in default thereof, the secretary of state is made the process agent.

It follows from these statutes that the legal domicile of the corporation is fixed when the charter is granted. There can be only one domicile at any given time, and once established, the domicile remains until a new one is acquired.[36]

A corporation, unlike an individual, may not change its domicile at will where it is fixed by law, as in this state, but only as authorized by law.[37] Thus, the domicile may be changed by amendment of the corporate charter[38] or by appropriate corporate action, as by resolution, where such method is authorized by the charter;[39] provided, however, that the formal change is followed or accompanied by actual removal from the county of the original domicile to that of the new.[40] The mere exercise of its franchise in a county foreign to that of its domicile does not confer venue on such county.[41] It would seem to follow that in the absence of a formal change, the charter-domicile would remain the exclusive venue-domicile even if the corporation conducts its principal place of business in a foreign county.[42]

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[33] See 17A Am. Jur., Domicile § 3.

[34] Miss. Code Ann. § 5310 (1942).

[35] Miss. Code Ann. § 5319 (1942).

[36] Estes v. Bank of Walnut Grove, 173 Miss. 499, 159 So. 104 (1935).

[37] 18 C. J. S., Corporations § 176 (c).

[38] Miss. Code Ann. § 5323 (1942).

[39] Estes v. Bank of Walnut Grove, 173 Miss. 499, 159 So. 104 (1935).

[40] Ibid.

[41] Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907 (1916).

[42] The case of Plummer-Lewis Co. v. Francher, supra note 41, was decided at a time when the general venue statute made no special provision for corporations. The question was whether, under the statute as it then existed, a domestic corporation might be found for venue purposes in a county in which it exercised its franchise through a branch office but which mantained its principal place of business in another county designated as its domicile by charter. By reference to the general statute on process, the court interpreted the legislative intent as being that a domestic corporation was subject to suit only in the county of its "principal place of business" which was held to be synonymous with "domicile." Since that case, the general venue statute was amended to take its present form in which the term "domicile" is used. As pointed out in the Plummer-Lewis case, the spirit of the law was to exempt domestic corporations from the expense and embarrassment of sending their records and agents into foreign counties to defend suits and in this respect to compensate for the denial of the right of removal given an individual. However, it is quite apparent that a domestic corporation has under the recent statutes, a right to select its domicile by compliance with the statutory requirements, and this is so despite the fact that its "principal place of business" is maintained elsewhere. Insofar as the Plummer-Lewis Co. case is authority for the proposition that venue is obtainable by "principal place of business" where such place does not coincide with the charter-domicile, it is nullified by the amendment of the venue statute and enactment of Sec. 5319 in 1928.

(3) *Where Cause May Occur or Accrue*

The general statute provides in the alternative that suit shall be commenced against domestic corporations in the county where "the cause of action may occur or accrue."[43]

Recognizing a diversity of opinion upon the subject,[44] our court has defined the term "cause of action" as referring to "a right to institute and carry on an action," and not to the facts giving rise to an action. It is further held that the term "occur" and the term "accrue" are used to mean the equivalent of "accrue," which, in turn, is defined as meaning "to come into existence as an enforceable claim; to vest as a right."[45]

A cause of action occurs or accrues within the meaning of the statute when,[46] and in the locality where, the right to institute suit comes into existence. Such right can mature only in the county where the final act occurs.[47]

In personal injury actions, the cause of action accrues in the county where the injury is inflicted or the person of the injured party is impinged upon. Several decisions illustrate the rule. In an action for damages resulting from drinking a beverage containing foreign substances, the venue is in the county where the beverage is consumed and not where it is bottled.[48] In actions for negligence producing death, the venue is laid in the county where the injury is inflicted and not where the negligent omission originates[49] or where death subsequently results.[50] In this latter respect, the right to sue accrues the instant that the injury is inflicted and not before, although the cause of injury may have originated elsewhere and at a different time.[51] Subsequent death may increase the damages and alter the parties entitled to bring and maintain suit, but the place where the cause of action accrued is not changed.[52]

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[43] Failure to designate a process agent under Sec. 5319 (Miss. Code Ann. § 4140 (1930)) does not prevent venue being maintained in the accrual county. In this respect domestic and foreign corporations are governed by different rules. Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931).

[44] The diversity was referred to in Coca-Cola Bottling Co. v. Cox, 174 Miss. 790, 165 So. 814 (1936). The different shades of meaning that may govern, depending upon the subject under consideration, are referred to in Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316 (1935).

[45] Grenada Bank v. Petty, supra note 44; Forman v. Miss. Publishers Corp., 195 Miss. 90, 14 So.2d 344 (1943).

[46] Cox v. American Freehold & L. Mfg. Co., 88 Miss. 88, 40 So. 739 (1906); Johnson v. Pyles, 19 Miss. 189 (1848); Central Trust Co. v. Meridian Light & Ray Co., 106 Miss. 431, 63 So. 575, 51 L. R. A. (n. s.) 151 (1913); Graham McNeil Co. v. Scarbrough, 135 Miss 59, 99 So. 502 (1924); Atlantic Life Ins. Co. v. Serio, 171 Miss. 726, 157 So. 474 (1934), cited in Grenada Bank v. Petty, supra note 45.

[47] See 133 A. L. R. 260 and case cited notes 48 - 54 infra.

[48] Coca-Cola Bottling Co. v. Cox, 174 Miss. 790, 165 So. 814 (1936).

[49] See Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977 (1883). This case involved a question of conflict of laws. Said the court: "Physical force proceeding from this state and inflicting injury in another state might give rise to an action in either state, and vice-versa; but the omission of some duty in Mississippi cannot transfer a consequence of it manifested physically in another state to Mississippi." See also Ala. G. S. R. Co. v. Carroll, 97 Ala. 126, 11 So. 803, 18 L. R. A. 433, 38 Am. St. Rep. 163 (1892), wherein the Mississippi rule is referred to and followed. As pointed out and demonstrated in 133 A.L.R. 260, the rule is in accord with the great weight of authority.

[50] See 133 A.L.R. 260.

Other cases involving tort actions illustrate this rule. Thus, in an action for malicious prosecution, the venue is in the county where the plaintiff is tried and acquitted and not where he is taken into custody, since the right of action does not come into existence until the prosecution terminates in the plaintiff's favor.[53] In an action for damages resulting from the pollution of a stream by the defendant's factory, the venue is in the county where the damage is caused to the plaintiff's property and property rights and not where the obnoxious matter is deposited in the stream. It is observed in this case that although the "cause of injury" originated in another county, it was harmless until the damage resulted therefrom.[54] An action for libel contained in a newspaper occupies a special field, since it is held that the action accrues where the paper is published and not elsewhere.[55]

This statement of the rule is not limited to tort actions, and no reason appears why the test should not apply to actions on or for the breach of contract. Only one decision has been found from this jurisdiction specifically treating the subject in reference to venue. It is held that a cause of action for breach of contract accrues in the county where performance is due. In a claim for breach of a contract of sale and delivery, the cause accrues in the county where the article was to have been delivered and installed.[56]

E. FOREIGN CORPORATIONS

(1) *In General*

For venue purposes corporations organized outside of the state may be classified as domesticated corporations, qualified corporations and non-qualified corporations. The corporations that have become domesticated are specifically provided for by statute.[57]

Foreign corporations are not expressly mentioned in the general venue statute.[58] The process statute applicable generally to foreign corporations makes no direct reference to venue as such, but provides that

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[51] Ibid.

[52] Ibid.

[53] Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316 (1935).

[54] Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292, 91 A.L.R. 752 (1933).

[55] Forman v. Miss. Publisher's Corp., 195 Miss. 90, 14 So.2d 344 (1943).

[56] See Southern Wholesalers v. Stennis Drug Co., 214 Miss. 461, 59 So.2d 78 (1952). See also 92 C.J.S., Venue § 30.

[57] Miss. Code Ann. §§ 5339-42 (1942). Such corporations are placed on the same basis as domestic corporations, but they remain non-residents within the provisions for attachment and removal to the federal court. See Southern Motor Express Co. v. Magee Truck Lines, 181 Miss. 223, 177 So. 653, 114 A.L.R. 1377 (1937).

[58] Miss. Code Ann. § 1433 (1942).

"Process may be served upon any agent of said corporation found within the county where the suit is brought."[59] Another section provides that all foreign corporations doing business in this state shall be subject to suit to the same extent as domestic corporations.[60] The corporation act of 1928 provides for qualification of foreign corporations in this state and the appointment of a resident process agent.[61] This statute does not require the foreign corporation to maintain an office in charge of the process agent or officer or other agent, as in the case of domestic corporations.[62] There is no statute specifically fixing the domicile of foreign corporations, as in the case of domestic corporations. Bearing these statutes and comments in mind, a discussion of the venue rules governing the different classes of foreign corporations follows.

(2) *Qualified Corporations*

Foreign corporations doing business in this state are required by statute to file with the secretary of state a copy of the charter and a written power of attorney "designating the secretary of state or in lieu thereof an agent" upon whom service of process may be had in the event of suit.[63]

In view of this statute and the constitutional limitations against discrimination, it is held that the qualified foreign corporation has the same rights and is subject to the same disabilities as domestic corporations insofar as venue is concerned. The rule has been stated as follows:[64] where a foreign corporation, doing business in the state, has fully qualified under the act by filing its charter and appointing a resident agent for the service of process, it stands, as to venue, in the identical position of a domestic corporation. It may be sued and the venue sustained either in a county where the cause of action occurred or accrued or in the county of its domicile where its designated agent resides. If sued where the cause of action accrues, process may issue to and be served upon the process agent in another county where he resides. In other words, it may be found in either of the places where a domestic corporation may be found, and, as in the case of a domestic corporation, it may not be found elsewhere merely because an agent is served with process or merely because it may be found exercising its franchise in a county other than that of its domicile.[65]

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[59] Miss. Code. Ann. § 5346 (1942).

[60] Miss Code. Ann. § 5345 (1942).

[61] Miss. Laws 1928, c. 90, Miss. Code Ann. § 4140 (1930); Miss. Code Ann. § 5319 (1942).

[62] Miss. Code Ann. § 5319 (1942).

[63] Ibid.

[64] See Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887 (1930), followed in Forman v. Miss. Publisher's Corp., 195 Miss. 90, 14 So.2d 344 (1943).

[65] Accord, McLeod Lumber Co. v. Manassa Timber Co., 180 Miss. 552, 178 So. 83 (1938), holding that where the action accrues without the state, the venue cannot

VI. RIGHT OF REMOVAL OR DISMISSAL

If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence and in a court having no venue, the venue shall be changed, on his application before the jury is impaneled, to the county of his household and residence.[66] Since the act of 1940, a corporate objection to venue, if sustained, will result in a transfer of the case and not a dismissal as was the case before.[67]

A. Public Officers

A public officer is given the right of removal, but his position is different from that of an ordinary individual in that lawful joinder of a local defendant does not defeat the right of removal.[68] The provision as to public officers was to prevent taking the officer away from his jurisdiction and thus interfering with the administration of his official duties.[69] However, the statute extends the right to suits filed after the officer's term of office expires.[70] The provision is not invalid as discriminatory, since there is a substantial reason for the special classification.[71]

Executors and administrators are not public officers in the sense of this statute and they stand on the same footing as individuals for venue purposes.[72]

However, the right of a public officer to trial in the county of his household and residence is not absolute in all circumstances. The right

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be maintained in the county of the plaintiff's residence, but must be laid in the county where the corporation has its place of business and where its process agent resides. See also Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931), where the Sandford case referred to Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292, 91 A.L.R. 752 (1933). The rule in the Sandford case is based upon a consideration of Miss. Code Ann. §§ 495, 4140 (1930) (Miss Code Ann. §§ 1433, 5319 (1942)) and the constitutional limitation against discriminatory legislation as discussed in Power Mfg. Co. v. Saunders, 274 U. S. 490 (1927) and Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 49 A.L.R. 713 (1926). The conclusion is that any other construction of the statutes would render the same unconstitutional as an unlawful discrimination between domestic and foreign corporations. Consideration was also given to Miss. Code Ann. § 4166 (1930) (Miss. Code Ann. § 5345 (1942)), declaring that all foreign corporations doing business inthis state shall be subject to suit here to the same extent that corporations of this state are, as applying primarily to substantive matters but as indicating the legislative policy. The law was expressly left the same as to non-qualified corporations. Expressly excluded from decision were questions arising as to insurance companies, railroad companies and companies having designated only the secretary of state as process agent.

[66] Miss. Code Ann. § 1433 (1942).

[67] See subdivision VI B.

[68] Miss. Code Ann. § 1433 (1942). Myers v. Vinson, 212 Miss. 85, 54 So.2d 168 (1951); Birdsong v. Grubbs, 208 Miss. 123, 43 So.2d 878 (1950). Prior to amendment in 1926 (Miss. Laws 1926, c. 155), the public officer was on the same footing as an ordinary citizen. See Dean v. Brannan, 139 Miss. 312, 104 So. 173 (1925); State v. Cloud, 146 Miss. 642, 112 So. 19 (1927).

[69] Pan American Petroleum Corp. v. Pate, 157 Miss. 822, 126 So. 480, *suggestion of error overruled,* 128 So. 870 (1930).

[70] Miss Code Ann. § 1433 (1942).

[71] See note 69 supra.

[72] Myers v. Vinson, 212 Miss. 85, 54 So.2d 168 (1951).

does not prevail against the right of a co-defendant to a change of venue because of local prejudice,[73] and it is to be noted also that the right applies only in circuit court actions where the circuit court has original jurisdiction. Thus, a public officer sued in a justice court cannot avail himself of the right of removal on appeal to the circuit court.[74] Also, where other specific statutes apply, such specific statutes control over the general venue statute. Thus, it is held that the right of removal does not exist in a special proceeding against the officer by motion for failure to levy execution, since the statute[75] requires presentation before the court to which the execution is returnable.[76]

B. CORPORATIONS

In reference to the right of removal, the statute makes no reference to corporations. It has been held that corporations have no right of removal of a cause. The result is that on valid objection to venue by a corporate defendant, the suit is simply dismissed without prejudice.[77] But in 1940, a general statute, applicable to all defendants, was enacted, whereunder a case brought in the wrong venue may not be dismissed but it "shall, by the court, be transferred to the venue to which it belongs."[78]

C. INDIVIDUALS — BASIS OF RIGHT

The individual defendant may assert the right to a change of venue to the county of his household and residence whenever there is no co-defendant, properly joined, against whom the venue is lawfully maintainable. For example, when the plaintiff states a cause of action in good faith against a local co-defendant, whether individual or corporate, properly joined as a defendant in a joint cause of action the non-local defendant has no right of removal.[79] The same rule applies whenever the co-defendant, properly joined, is made subject to the venue by the statutes, as when a corporation is joined and suit is in the county where the cause of action against it accrued or where a foreign individual codefendant, in the absence of fraud, is physically found and served with process in the county.[80]

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[73] Miss. Code Ann. § 1443 (1942); Tucker v. Gurley, 176 Miss. 708, 170 So. 230 (1936).

[74] Womack v. Richardson, 168 Miss. 347, 151 So. 173 (1933); Yalabusha County v. Carbry, 6 Miss. 529 (1844).

[75] Miss. Code Ann. § 4244 (1942).

[76] Womack v. Richardson, 168 Miss. 347, 151 So. 173 (1933).

[77] Nicholson v. Gulf M. & N. R. Co., 177 Miss. 844, 172 So. 306 (1937).

[78] Miss. Code Ann. § 1441 (1942). This statute was mentioned but not applied in Ravesies v. Martin, 190 Miss. 92, 199 So. 282 (1940). It was applied in State ex rel. Cowan v. State Highway Commission, 195 Miss. 657, 13 So.2d 614 (1943). It was not mentioned and was apparently overlooked in Foreman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So.2d 344 (1943) and in Ainsworth v. Blakeney, 98 So.2d 880 (Miss. 1957).

[79] Daniel v. Livingston, 168 Miss. 311, 150 So. 622 (1933); Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874 (1927); Bufkin v. Grisham, 157 Miss. 746, 128 So. 563 (1930); Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920); Miss. Power & Light Co. v. Lowe, 179 Miss. 377, 175 So. 196 (1937); Dean v. Brannon, 139 Miss. 312, 104 So. 173 (1925); Myers v. Vinson, 212 Miss. 85, 54 So.2d 168 (1951).

D. Procedure for Removal — Waiver

The change of venue is accomplished by "application," which generally takes the form of a motion. The application must be filed and presented before the jury is impaneled,[81] provided the condition has then arisen. In the event that such application is improperly granted, the plaintiff may file a motion to remand. This motion is filed in the court to which the action is removed and the refusal of that court to sustain the motion may be reviewed on appeal. In such cases the Supreme Court will reverse and may remand to the court in which the action was improperly tried with directions to transfer to the court having the proper venue.[82]

It is held that the right of removal may be asserted and the action removed whenever the condition therefor arises,[83] unless the right has been waived.[84] From this it follows that the application need not, under all circumstances, be made before the jury is impaneled or before a plea to the merits is interposed. The different situations which may be presented are discussed below. But venue is a personal privilege and may be waived.[85]

If the right to a change of venue is apparent from the declaration of proceedings, the application should be made promptly and before any plea to the merits is filed. Ordinarily a plea to the merits is a waiver,[86] but if timely application is made the court may allow the plea to be withdrawn and the application for change of venue filed.[87] Permission to withdraw a plea to the merits in this connection is discretionary with the trial court.[88] However, under the more recent pleading statute[89] the venue objection may be raised in the answer.[90]

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[80] See note 79 supra; also Pan American Petroleum Corp. v. Pate, 157 Miss. 822, 126 So. 480 (1930); Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920), and cases cited therein.

[81] Miss. Code Ann. § 1433 (1942).

[82] Daniel v. Livingston, 168 Miss. 311, 150 So. 662 (1933).

[83] Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941); Tucker v. Gurley, 176 Miss. 708, 170 So. 230 (1936).

[84] Howard v. Ware, supra note 83; Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920).

[85] Catlett v. Drummond, 113 Miss. 450, 74 So. 323 (1917); Stanley v. Cruise, 134 Miss. 542, 99 So. 376 (1924); Halliburton v. Crichton, 147 Miss. 621, 111 So. 743 (1927); Indianola Cotton Oil Co. v. Crowley, supra note 84; In Ainsworth v. Blakeney, 98 So.2d 880 (Miss. 1957), it was held that an objection to venue in the form of a motion at the conclusion of the plaintiff's evidence was not timely and that venue was waived.

[86] Grenada Bank v. Petty, 174 Miss. 414, 164 So. 316 (1936); King v. Ainsworth, 83 So.2d 93 (Miss. 1955).

[87] Grenada Bank v. Petty, supra note 86.

[88] Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316 (1935), (permission granted): Indianola Cotton Oil Co. v. Crowley, 121 Miss. 62, 83 So. 409 (1920) (permission denied).

A motion to quash the process is not such a general appearance as to constitute a waiver of an application thereafter filed for change of venue. By such a motion the defendant does not waive any question of jurisdiction over either the subject matter of the suit or the venue of the action.[91] Likewise a plea challenging the jurisdiction generally is not a waiver of the venue objection.[92] On the other hand, a general demurrer is equivalent to a plea to the merits and amounts to a waiver of venue.[93]

A waiver may result from the assumption of an inconsistsent position. Thus, where a defendant pleads that an accident was due to the negligence of the local co-defendant, an objection to venue on the ground that the plaintiff's proof failed to involve local co-defendant is not well taken and will be overruled on the theory of judicial estoppel.[93a]

However, the circuit court may not be put in error for sustaining a venue objection filed after a general demurrer or a plea to the merits unless the waiver point is raised in that court. The matter of waiver will not be considered when raised for the first time on appeal.[94]

When an objection to venue is duly raised, the point is not waived by pleading to the merits or going to trial after the venue plea is overruled, and the objection may be effectively interposed during or at the end of the trial or whenever the condition which makes the right apparent arises.[95] Thus, when the defendant on objection to the venue fails to sustain the burden, on the venue hearing, of showing improper joinder of a local co-defendant, the objection may be effectively reasserted if, on the trial, the invalidity of the joinder becomes apparent.[96]

Other phases of procedure will be discussed in connection with the subject of joinder of co-defendant for venue purposes.

E. VALIDITY OF JOINDER

In order to forestall dismissal or change of venue on the plea on motion of one not subject to the venue of the court, a local co-defendant or a co-defendant against whom venue can be sustained must be joined in the suit.

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[89] Miss. Code Ann. § 1475-51 (1942).

[90] Brashier v. O'Connor, 181 Miss. 872, 180 So. 67 (1938) (a suit in chancery).

[91] Batson & Hatten Lumber Co. v. McDowell, 159 Miss. 322, 131 So. 880 (1931).

[92] Nicholson v. Gulf M. & N. R. Co., 177 Miss. 844, 172 So. 306 (1937), and cases cited.

[93] Estes v. Bank of Walnut Grove, 172 Miss. 499, 159 So. 103 (1935).

[93a] Great Southern Box Company v. Barrett, 94 So.2d 912 (Miss. 1957).

[94] Ibid.

[95] Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941); Gulf Export Co. v. State, 112 Miss. 452, 73 So. 281(1917).

[96] Howard v. Ware, supra note 95; Cf. Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931). The objection to venue must be specific and should be accompanied by a motion to transfer to the proper venue. The court cannot dismiss the suit (Miss. Code Ann. § 1441 (1942)) and cannot transfer it absent an objection to venue. A motion for a directed verdict is not a proper objection to venue. King v. Ainsworth, 83 So.2d 97 (Miss., 1955).

The stated requirement contemplates that the venue-defendant be a material party and that joint liability is made apparent.[97] The first requirement is that the declaration state a joint cause of action[98] and that process be served, and that as to such defendant the court acquire territorial jurisdiction.[99] If the alleged cause of action is several and not joint, the requirement is not met.[100]

The allegations of the declaration are prima facie true and there is a prima facie presumption of good faith which attaches thereto,[101] but the declaration is not conclusive.[102]

It is said that the right of the plaintiff to select the forum in a proper proceeding is a valuable right[103] and where a choice is lawfully exercised the right of election may not be denied. On the other hand, the venue rights of a defendant are equally valuable and not merely technical.[104]

The local defendant must be a material party. Moreover, he must be a proper party. It has been said that he must not be joined for the sole purpose of venue, but this statement is limited in application to those instances where, in effect, the joinder is not in good faith, as where fraud, connivance or improper device is utilized in finding the defendant in the county or liability is asserted against such defendant without cause.

In many respects the test as to a proper joinder of a local or venue-defendant seems to rest upon the good or bad faith of the assertion of a joint cause of action. If the plaintiff, in good faith, asserts a joint cause of action and follows through with an attempt, in good faith, to prove it, the joinder is not improper, for venue purposes, merely because the proof is insufficient to hold the local defendant liable as a matter of law.

Thus, when a directed verdict results as to the local defendant, the co-defendant may or may not be entitled to a change of venue, depending upon the good faith of the plaintiff at the outset, determined in the light of the developments on the trial. A directed verdict does not destroy the venue when the validity of the joinder depends upon an unsettled question of law on which there is a conflict of authority.[105] Also, where a reasonable effort is made from the factual viewpoint to prove liability, venue is not lost by a directed verdict in favor of the local defendant.[106]

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[97] Daniel v. Livingston, 168 Miss. 311, 150 So. 662 (1933); Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874 (1927); Bufkin v. Grisham, 157 Miss. 746, 128 So. 563 (1930).

[98] Gulf Export Co. v. State, 112 Miss. 452, 73 So. 281 (1916).

[99] Cook v. Pitts, 114 Miss. 46, 74 So. 777 (1917); Estes v. Bank of Walnut Grove, 172 Miss. 499, 159 So. 104 (1935).

[100] Bergen v. Smith, 163 Miss. 797, 141 So. 760 (1937).

[101] Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941); Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931).

[102] See note 101 supra; see also Long v. Patterson, 198 Miss. 554, 22 So.2d 490 (1945).

[103] Daniel v. Livingston, 168 Miss. 311, 150 So. 662 (1933); Great Southern Box Co. v. Barrett, 94 So.2d 912 (Miss. 1957).

[104] Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931); Great Southern Box Co. v. Barrett, 94 So.2d 912 (Miss. 1957).

But when the joinder is had after a promise or agreement on behalf of the plaintiff to hold the local defendant harmless, as by a promise or agreement that he not be "hurt" as a result of the suit, the joinder is invalid and will not support venue.[107] The same result has been reached where the venue defendant is "found" by fraud or improper device.[108]

There is no indication in the authorities that venue is lost merely because the local defendant may be judgment proof or because the plaintiff intends to collect exclusively from the non-local defendant, unless the intention is manifested by promise or agreement on the part of the plaintiff, in effect, to hold the local defendant harmless. There may be other sufficient reasons for the joinder which are consistent with good faith, such as a desire to call the local defendant as an adverse witness or the fear that the theory of respondeat superior may not be maintainable in a tort action. Whatever the reason, the joinder is sufficient unless found to be in bad faith and solely for the purpose of venue.

But bad faith, in the strict sense, is not always controlling. Invalid joinder for venue purposes may extend to honest error. Thus, when it is shown clearly, as a matter of law, that the local defendant is not liable in the action[109] or when the plaintiff fails to attempt to prove liability as a matter of fact[110] the venue is lost, and this results without reference to the good faith in the strict or moral sense. Also, the fact that the trial court erroneously permits judgment to be entered jointly does not save the venue.[111]

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[105] Weems v. Lee, 185 Miss. 98, 187 So. 531 (1939).

[106] Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931); Cox v. Dempsey, 177 Miss. 678, 171 So. 789 (1937); Great Southern Box Co. v. Barrett, 94 So.2d 912 (Miss. 1957).

[107] McRae v. Ashland Plantation Co., 187 Miss. 350, 192 So. 847 (1940); Great Southern Box Co. v. Barrett, 94 So.2d 912 (Miss. 1957).

[108] Nicholson v. Gulf M. & N. R. Co., 177 Miss. 844, 172 So. 306 (1937). In such cases the question is not so much a question of technical jurisdiction as it is the propriety of exercising a jurisdiction based upon fraud or improper device. The court may retain jurisdiction of the party so "found" and dismiss as to co-defendants. See also McRae v. Ashland Plantation Co., supra note 107; Great Southern Box Co. v. Barrett, 94 So.2d 912 (Miss. 1957).

[109] Long v. Patterson, 198 Miss. 554, 22 So.2d 490 (1945), citing Howard v. Ware, 192 Miss. 36, 3 So.2d 830, 140 A.L.R. 1248 (1941), and distinguishing Weems v. Lee, 185 Miss. 98, 187 So. 531 (1939); Birdsong v. Grubbs, 208 Miss. 123, 43 So.2d 878 (1950).

[110] Cf. Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931); Howard v. Ware, supra note 109.

[111] Cox v. Dempsey, 179 Miss. 678, 171 So. 789 (1937).

Another requirement to effective joinder is the service of process upon the defendant on whom venue depends. On dismissal of such defendant for failure of process, venue is lost.[112] On the other hand, when a local defendant, properly joined, is served with process and the non-local defendants suffer judgment by default, the plaintiff may dismiss as to the local defendant without loss of venue.[113]

F. Procedure for Attacking Venue for Invalid Joinder

There remains for discussion the procedure for attacking the question of venue on the issue of the validity of joinder. From a comparison of the decisions dealing with this subject, the rules may be summarized as stated below.

If the declaration states no cause of action against the local defendant or if the declaration shows on its face that he is not a material party or that his alleged liability is separate and not joint, the objection must be sustained.[114] In such cases the objection should be made promptly and in any event before the jury is impaneled, and regard should be had for the rules of waiver by pleading generally without reserving the venue objection.

If, on the other hand, the declaration is in all respects sufficient on its face, it is prima facie correct but not conclusive,[115] and the venue objection must be sustained if and when it appears that the plaintiff actually has no cause of action against the local defendant and he was improperly joined for the sole purpose of conferring venue. In such cases, the objecting defendant may attack the declaration preliminarily and by plea in abatement or motion, in which proceeding the movant has the burden of proof,[116] or he may object to the venue whenever the condition therefor arises, as where the plaintiff, having properly alleged a cause of action, rests his case without making any attempt to prove liability.

The right to object when the condition arises is not lost by having objected preliminarily and having failed to meet the burden of proof on the prelminary hearing, and the fact that the trial court erroneously enters a joint judgment will not serve to sustain the venue.[117]

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[112] Perry v. Nolan & Maris, 159 Miss. 387, 131 So. 252 (1930); Estes v. Bank of Walnut Grove, 114 Miss. 46, 74 So. 777 (1935), and cases cited; Wooley v. Brown, 41 Miss. 552 (1867).

[113] Reed v. Renaud, 14 Miss. 79 (1840). It was reasoned that the court having once acquired jurisdiction did not lose it by any subsequent change of circumstances such as appear in this case.

[114] Gulf Export Co. v. State, 112 Miss. 452, 73 So. 281 (1916); Birdsong v. Grubbs, 208 Miss. 123, 43 So.2d 878 (1950).

[115] Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931); Long v. Patterson, 198 Miss. 552, 22 So.2d 490 (1945); Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941).

[116] Gasquet v. Fisher, 15 Miss. 313 (1846); Trolio v. Nichols, supra note 115; McRae v. Ashland Plantation Co., 187 Miss. 350, 192 So. 847 (1940); Forman v. Miss. Publisher's Corp., 195 Miss. 90, 14 So.2d 344, 148 A. L. R. 469 (1943); Howard v. Ware, supra note 115.

Where the non-local defendant has reason to believe that the joinder is not in good faith, the better practice would be to expressly deny the pertinent allegation of the declaration and to expressly reserve all objections to venue. Under our recent pleading statute[118] this may be included in the answer, and it will serve to exclude any contention that the point was waived.[119]

It is noted that while the objection to venue may be asserted when the condition therefor arises and while this is a valuable right, it is still a personal privilege and not fundamentally jurisdictional. Therefore, objection should be made at the first opportunity, which is the time when the objecting defendant is apprised of the conditions on which venue may be attacked. Here diligence is required to forestall the finding of waiver. If the plaintiff, because of his bad faith, is not entitled to consideration in this respect, the public has an interest in the avoidance of the expense of abortive trials.[120]

G. HOUSEHOLD AND RESIDENCE—DEFINED

In order that an individual shall have the right of removal, he must be a citizen of this state and a resident of the state, and so it has been held that a traveling salesman who has no established home or fixed place of residence has no right of removal to a place where he frequently stays.[121]

The statute uses the terms "household and residence." Persons who dwell together as a family constitutes a "household," and a householder is one who has a family whom he keeps together and provides for and of which he is the head and master.[122] Residence is the equivalent of "domicile" and is synonymous therewith. A domicile is a "legal residence."[123] In applying the venue statute, however, the phrase "household and residence" has been considered in the sense of a legal residence or domicile, and the technical definition of a "household" has been disregarded.[124]

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[117] Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941).

[118] Miss. Code Ann. § 1475.5 (1942).

[119] Technically, the issue may be raised preliminarily by plea or by motion or by both. Long v. Patterson, supra note 115. But by inclusion of the plea in the answer, followed by a motion for preliminary hearing, the defendant will preserve the point and at the same time give the trial court the option of hearing the matter preliminarily or of remanding the issue for determination on the trial, thus avoiding possible abuse of the procedure and trial of factual issues in piecemeal. Cf. Forman v. Miss. Publisher's Corp., 195 Miss. 90, 14 So.2d 344, 148 A.L.R. 469 (1943).

[120] Long v. Patterson, supra note 119, wherein the court recognized the rule that venue may be changed whenever the condition therefore arises, but commented that "this is particularly true when the conditions have been clearly disclosed in limine as here." Cf. Forman v. Miss. Publisher's Corp., supra note 119, for warning as to possible abuse of the procedure where it is sought to thresh out the merits of a plaintiff's case by piecemeal.

[121] Knower v. Baldwin, 195 Miss. 166, 15 So.2d 47 (1943).

[122] Buckley v. Porter, 160 Miss. 98, 133 So. 215 (1931).

[123] Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938).

What then is a legal domicile or residence? It is said that one resides where he has a settled abode for a time, for business or other purposes, although he may intend at some future time to move to another place.[125] However, temporary residence in one county for business purposes may be consistent with a legal domicile elsewhere.[126]

A domicile once established is presumed to continue and the burden of proving the contrary is upon the party alleging it. To show a change and rebut the presumption, it must be demonstrated that the apparent change was not only voluntary but that it was the intent of the person to remain at the new abode without intention of returning to the former domicile, and mere lapse of time does not alone constitute an abandonment within the rule.[127]

VII. LITIGANTS EXCLUDED

Governmental agencies in corporate form which are subject to suit are not specifically mentioned in venue statutes, but by reference to the common law, it has been held that a municipal corporation may be sued only in the county where it is located and that the jurisdiction may not be maintained elsewhere by joinder of local defendants or defendants jointly liable and subject to suit in some other county.[128]

VIII. LOCAL ACTIONS

The discussion heretofore has been related to personal or transitory actions. Local actions fall in a different category. These, according to the venue statute, consist of actions of trespass on land, of ejectment, and for the wrongful cutting of trees. Such actions "shall" be brought in the county where the land, or some part thereof, is situated, except that if the land lies in two or more counties and the defendant resides in either, the action "shall" be brought in the county of his residence.[129]

This provision is mandatory and involves the court's jurisdiction over the subject matter. Where such jurisdiction is absent it cannot be waived or conferred by consent of the parties.[130] These are the only ordinary actions which can be brought in a county where the defendant is not found physically or by reason of statutory provisions.[131] In rem actions are also excluded.[132]

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[124] see e.g., Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920).

[125] Buckley v. Porter, 160 Miss. 98, 133 So. 215 (1931); Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938).

[126] Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938).

[127] Ibid.

[128] Jackson v. Wallace, 189 Miss. 252, 196 So. 223 (1940); see also State ex rel. Cowan v. State Highway Comm., 195 Miss. 657, 13 So.2d 614 (1943), dealing with a suit against a state corporation.

[129] Kraus v. Stewart, 122 Miss. 503, 84 So. 463 (1920); Jefferson Davis County v. Riley, 158 Miss. 473, 129 So. 324 (1930); *aff'd.* 130 So. 283 (1930); Cf. Bassett v. Stringer, 216 Miss. 766, 63 So.2d 234 (1953).

[130] Wilkinson v. Jenkins, 77 Miss. 603, 27 So. 611 (1900).

IX. RELATED VENUE STATUTES

Special statutes apply to various litigants and from these it is to be determined where such litigants may be found for venue purposes.

For example, railroad, express, steamboat, power, telegraph, telephone and transportation corporations and their operators may be found for venue purposes in any county in which the line or route may be.[133]

Insurance companies may be found in any county in which the loss may occur and life insurance companies may be found wherever the beneficiary resides. They may also be found in the county of the corporate domicile.[134]

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[131] Elder v. Hilzheim, 35 Miss. 231 (1858); Archibald v. Miss. U. T. R. Co., 66 Miss. 424, 6 So. 238 (1889).

[132] Eaton v. Hattiesburg Auto Sales Co., 151 Miss. 211, 117 So. 534 (1928).

[133] Miss Code Ann. § 1434 (1942).

[134] Miss. Code Ann. § 1435 (1942).

THE FORM AND CONTENT OF PLEADINGS

*Offa Lunsford Casey**

GENERAL DISCUSSION

With no apologies for brevity, an article on the *Form And Content Of Pleadings* when limited to the high points of the declaration and the answer in the circuit court does not adequately cover such a sweeping subject.[1] Generally, the subject may be covered by quoting the Latin axiom used in *Coke on Littleton,* Nihil simul inventum est et perfectum. It is repeated on the title page of *Chitty on Pleadings,*[2] and is still applicable today. Slowly and arduously we seek to improve our system of pleading. However, in our Mississippi practice we are still far away from attaining perfection. Nevertheless, in this state the strictness of common law pleadings has long since been liberalized, as far as form is concerned, by an act of legislation.[3] The Mississippi Supreme Court has broadly interpreted the statute relating to declarations.[4] In another decision it was held that what applies to the declaration likewise applies to its amendments.[5] However liberal our statutes concerning the form of pleadings may seem, in actual practice we have maintained practically the same type forms in different proceedings for many years. Furthermore, upon examination, these forms will be found not to differ too greatly from those set up as model forms in the old textbooks on pleadings used in the early days of the Mississippi practice. Specific forms are still prescribed and are adhered to even to the point of ritualism in those types of proceedings that are regulated by special statutes. As an example, legislation enacted into the Code governing ejectment have been construed as indicating the extent to which the recession from common law should be conceded. In a recent case the Mississippi Supreme Court held that the legislature retained all the requirements of common law not specifically dispensed with.[6] The opinion traces the statutory authority back to the Code of 1857 and states that today the entire chapter governing the form of this procedure is almost completely the same as that enacted 90 years ago.[7] Apparently the earlier attempt made by the Legislature in 1850 to dispense with precise formal proceedings construed to be applicable to proceedings in ejectment[8] was not favorably received by the practicing bar, or at least by those charged with drafing the Code of 1857. In those days, as today, there was opposition to simplicity and brevity or progressive change, because the Code of 1857 was enacted with the old archaic ejectment proceedings and these same proceedings are continued in each of the various Codes down to the present time.[9] The Supreme Court indicated progress was needed, but, nevertheless, held that the form of the proceedings bound the user to its limitations.

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[1] If this article was prepared in words appropriate under common law pleadings, this footnote would read as follows: "Though the author desires to fully discuss all matters of form and content of pleading, of necessity and due to the exigencies of the occasion and the supreme length of court dockets, this article is limited in scope to those problems relating to the declaration and answer in civil cases, excluding all criminal matters and civil proceedings which must meet the requirements of special statutes, and is further limited to a rather random choice of points not to be taken as indicating a particular precedence in importance."

However, since the article is prepared in the light of present day tendencies in pleading the footnote most properly reads: "This article is extremely limited in scope."

[2] Chitty on Pleadings (1851).

[3] Miss. Code Ann. § 1464 (1942). The sources of this act indicate its adoption as early as Hutchinson's Code (1848). See also §§ 1475.5, 1500, 1501, 1502.

[4] Evans v. Miller, 58 Miss. 120 (1880); Southeastern Express Co. v. Namie, 182 Miss. 447, 181 So. 515 (1938).

[5] Federal Compress Co. v. Craig, 192 Miss. 689, 7 So.2d 523 (1942).

The form and content of pleadings are prescribed to a certain extent by statute in certain types of cases. These include actions of unlawful entry and detainer,[10] trial of the rights of personal property levied on under execution,[11] salvage claims,[12] actions between landlord and tenant with reference to attachment or distress for rent due or supplies furnished,[13] mandamus, prohibition and quo warranto,[14] attachment against depositors at law[15] and replevin.[16]

From lawyers and laymen alike, the criticism is sometimes voiced that legal procedure is bound too tightly by archaic forms and that this contributes to delay and to decisions that are not based on the merits of the case. Without wholly disputing this, the fact remains that all pleadings, of necessity, must have a manner and form of answering the complaint. Thus, there is a need for some prescription as to form and content in order to insure that justice between the parties will be speedily secured. Otherwise, liberality in pleading may produce chaotic results.

THE FORM OF PLEADING

A. Declaration

In Mississippi practice the form used to state a cause of action is a declaration.[17] By comparison, in Federal practice under the new rules instituted some twenty years ago, it is called a complaint,[18] and is required to be designated by name.[19] An examination of the Federal Rules of Civil Procedure and our own statute on declarations shows that under Mississippi practice the plaintiff, except in specific actions, is far less bound to any specific form than the complainants under the Federal Rules, although the latter are considered by many to be a model. Our statute leaves it wholly within the discretion of the pleader as to how he will set up his claim. On the other hand, the Federal rules, while not bound as to form in special actions[20] such as replevin and attachment, do specify an exact form for pleadings,[21] and to aid the pleader the Federal Rules have an Appendix of Forms. These are described as being inserted merely for illustration, but in reality are designed to meet the requirement of the Federal Rules—particular emphasis being placed on brevity and simplicity.[22] The point of simplicity and brevity is one that some attorneys fail to achieve in their Mississippi pleadings. Since the statute on declarations gives the plaintiff's attorney so much leeway in stating his case, there is a tendency to overstate it and thereby burden the court and the jury with "verbose verbiage." A remedy for this same complaint was once effectuated in English practice through the adoption of a court rule which taxed the offending attorneys with the cost incurred by their verboseness.[23]

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[6] Burns v. Allen, 202 Miss. 240, 31 So.2d 125 (1947).
[7] Ibid.
[8] Cooper v. Benson, 28 Miss. 766 (1855).
[9] Miss. Code Ann. c. 1 (1942).
[10] Miss. Code Ann. §§ 1033-1058 (1942).
[11] Miss. Code Ann. §§ 1020-1032 (1942).
[12] Miss. Code Ann. §§ 1007-1020 (1942).
[13] Miss. Code Ann. §§ 897-956 (1942).
[14] Miss. Code Ann. §§ 1109-1145 (1942).
[15] Miss. Code Ann. §§ 2675-2728 (1942).
[16] Miss. Code Ann. §§ 2841-2869 (1942).

While, as already noted, by legislative enactment no specific form of declaration is required in a suit in the circuit court,[24] yet even this broad statute contains some requisites as to form. Ordinary and concise language is required. The ordinary language used in Mississippi is English. Fortunately, we are not confronted with the problem of some of our more enlightened "melting pot" states where large minority groups cannot even understand English.[25]

In Section 1464 of the Code of 1942 the word *concise* modifies *langu-*

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[17] Miss. Code Ann. § 1464 (1942).

[18] Fed. R. Civ. P. 7(a).

[19] Fed. R. Civ. P. 10(a).

[20] Fed. R. Civ. P. 64.

[21] Fed. R. Civ. P. 8, 10 and 11.

[22] Fed. R. Civ. P. 84. Historically, English practitioners used the *Registrum Brevium* to secure model forms.

[23] The rule adopted subjected attorneys to a penalty if in declarations in assumpsit and debt the attorneys used words in excess of those prescribed by the forms attached to the rule in stating their case. Regula Generalis, Trinity Term. William IV, 1831, cited in 3 Chitty on Pleadings p. 1409 (1851).

[24] Miss. Code Ann. § 1464 (1942).

[25] In all the United States and the Territories, so far as ascertainable, pleadings may be stated in a language other than English only in Puerto Rico. There Spanish is used indiscriminately in the insular courts. However, if pleadings are in English it is customary to attach a Spanish translation. See Act of February 21, 1902; Act No. 15 of March 12, 1914, p. 145; Act. No. 8 of Nov. 12, 1919, p. 210, Puerto Rico Session Laws.

age and both words refer to the statement of facts. While the declaration needs to be factually complete, conciseness means briefly stating the facts necessary to show a cause of action without inserting grandiose phrases that are needlessly added and which are injected for the ears of the client and are intended as a grandstand play to the jury. Old common law pleading phrases should also be omitted.[26] An understandable statement of the case in logical sequence is of course highly desirable, but ineptness in the use of words is not held against the pleader in Mississippi.[27] At an early date our Appellate Court held that an expression in a declaration capable of different meanings will be interpreted in support of the declaration rather than to defeat it.[28]

By statutory requirement the declaration is styled with a heading that contains the name of the county in which the action is to be filed.[29] In practice, the name of the parties identified as plaintiff and defendant are also placed in the heading, together with the title of the pleading. In a few instances further identification of the parties has been given by stating the residence of both plaintiff and defendant in the heading, although generally this is a part of the body of the declaration. Such a heading is a part of the declaration and is noticed by the court.[30]

For many years all pleadings in the circuit court have been in writing.[31] In some instances to save time and for the sake of convenience, courts have permitted certain pleadings to be dictated into the record, but this is not a desirable practice since the stenographer's notes do not become a part of the clerk's file. There is one type of proceeding in which the requirement of written pleadings has been dispensed with by statute, although even there it is optional. This is the rare case of assessing the value of party walls.[32] However, in this type proceeding a written request is necessary to initiate the case before a magistrate. If it gets to the circuit court on appeal, no written pleadings are required. The apparent reason for this is that only one question is to be decided.

So far as the written form for the body of the declaration is concerned, separate paragraphs for the several divisible parts are in keeping with the intent of Section 1465. This not only produces easier reading and a more understandable document, but permits the separable facts to be separately answered in whole or in part, or allows admission or denial with better facility. Furthermore, it complies with the provisions of the statute governing answers.[33]

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[26] Miss. Code Ann. § 15 (1942).
[27] Brown v. Miss. Central R. Co., 144 Miss. 326, 109 So. 796, 798 (1926).
[28] Pender v. Dickens, 27 Miss. 252 (1854).
[29] Miss. Code Ann. § 1465 (1942).
[30] Hayes Produce Co. v. Taylor, 213 Miss. 217, 56 So.2d 503 (1952).
[31] See Bowman v. McLaughlin, 45 Miss. 461, 489 (1871).
[32] Miss. Code Ann. § 1005 (1942).
[33] Miss. Code Ann. § 1475.5, sub paragraph 2(a) (1942).

Under the common law it was necessary to state within the body of the declaration the form or type of action. Thus, in a negligence action against a common carrier for loss of goods, the first sentence of the declaration began as follows:[34]

> "C. C. Complains of D. D. Co., a corporation chartered by and doing business under the laws of the State of Mississippi, of a plea of trespass on the case in assumpsit; for this, to-wit, et cetera."

The declaration then concluded repetitiously with a final sentence apparently inserted to make certain that the court would have no misunderstanding as to the form of action, thus: "And therefore he institutes this action of trespass on the case in assumpsit." Almost one hundred years ago the Mississippi Supreme Court thought that the including of a statement of the form of action in the declaration was very important,[35] but not of sufficient importance to be fatal on general demurrer. An examination of cases filed in Jones County shows that as late as fifty years ago a few lawyers were still including in the declaration a reference to the form of action.[36]

The quaere raised in *Blackwell v. Reed*[37] was answered by the Supreme Court in a later decision which held that the character of a complaint or defense is determined by what it in fact is, and not what it is styled in tthe pleadings.[38] This decision was strengthened by the case of *Pierce v. Chapman*.[39] In that case the Court decided that a declaration against a member of a board of supervisors alleging a trespass by the cutting of trees on plaintiff's land was sufficient to permit recovery against the board member in his individual capacity, although the form of action was drawn to charge him in his official capacity—the decision stating that the form is not so essential as to avoid the substance of the declaration.[40]

A careful analysis of the facts in any case, and then a thorough study of the applicable law, both statutes and decisions, prior to the drafting of the declaration will, in most instances, obviate the necessity of the Supreme Court having to pass on such questions as arose in the above cited cases. Finally, all pleadings must be signed by the party or his attorney.[41] Where a declaration is filed without such a signature and the defendant is summoned, a motion to dismiss at the cost of the plaintiff should be sustained because there is no suit pending under the circumstances.

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[34] Gregory, Forms of Common Law Declarations, p. 33 (1906).

[35] Blackwell v. John Reed & Co., 41 Miss. 102 (1866).

[36] Circuit Clerk Files, 2nd District of Jones County, 1906 to 1912.

[37] 41 Miss. 102 (1866).

[38] Green v. Bounds, 112 Miss. 252, 72 So. 1001 (1916).

[39] 165 Miss. 749, 143 So. 845 (1932).

[40] But see Grissom v. General Contract Purchase Corporation, 191 Miss. 742, 4 So.2d 303 (1941). Of course replevin is governed by a special statute, but query: Is this not a step backward to a strict interpretation of the requirements of forms of action?

[41] Miss. Code Ann. § 1496 (1942).

Mississippi has an integrated bar,[42] and from time to time a few attorneys are suspended from membership and the right to practice law in the courts for non-payment of dues.[43] An interesting question will be presented if a pleading is challenged by a motion to strike on the grounds of having been signed by an attorney that has been suspended.[44]

B. Answer

The same liberality in form applicable to declarations is applicable to answers.[45] As long as the answer substantially meets the requirements of putting the case at issue, the form is not really material.[46] This was also the law prior to 1948 when the Legislature, on the recommendation of the Mississippi Bar Association, enacted into law the new statute which abolished pleas in the circuit court and which provided that every defense heretofore made by plea shall be made in an answer.[47] Prior to 1948 the form of pleas in abatement was prescribed to a certain extent by statute,[48] and the order of pleading defenses, which in effect is a matter of form, was regulated by statute to the extent of requiring the defendant to plead all abatement pleas first and have them disposed of before pleading in bar.[49] The luckless defendant who filed a plea of general issue and then discovered a matter in abatement could not then plead it,[50] and it was such bad form to join an abatement plea with a plea in bar[51] that it could result in a judgment for the plaintiff for want of proper pleading.[52] Of course it was logical to dispose of abatement matters first, but the refusal to permit pleas in bar and abatement to be filed at the same time resulted in needless delay and sometimes in injustice.

The purpose of discussing past history is to call attention to the fact that even where there are statutes and rules devised to simplify pleadings as to form so that the real object of a lawsuit may be more quickly attained, the Bar Association must always be on the alert to prevent a relapse to the technical form of pleadings. This apparently happened in our Mississippi Practice for the original source of Sections 1475 through 1477 of the Code of 1942 appears to be Hutchinson's Code of 1848. In 1850 the legislature simplified pleadings and abolished all common law forms. However, in 1857 when a new Code was enacted we went back to the more technical pleading, and Section 1478 was added. This section was a pleader's stumbling block, and permitted and required a much more formal type of pleading than had been contemplated in 1848 and 1850. As Justice Griffith points out, it took nearly one hundred years to recover what we gained in 1850, but lost in 1857.[53]

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[42] Miss. Code Ann. §§ 8685-8724 (1942).

[43] Miss. Code Ann. §§ 8699-8710 (1942).

[44] cf. Martinez, 318 S.W. 2d, 66 (Tex. 1959). This decision held that a defendant in a murder case, convicted and sentenced to death, and who was represented by a court appointed attorney whose name had been removed from the state bar rolls for non-payment of dues, had been deprived of his right to have counsel because he was represented by a person who had no right to practice law.

[45] Miss. Code Ann. §§ 1475, 1501 (1942). An excellent article which should be read by every practitioner was written by the late Chief Justice V. A. Griffith entitled "The New Mississippi Civil Practice Act—Its Background and Effect." XX Miss. L. J. 1 (1948).

[46] Neely v. Allis-Chalmers Mfg. Co., 174 Miss. 519, 165 So. 114 (1936).

[47] Miss. Code Ann. § 1475.5 (1942).

[48] Miss. Code Ann. § 1476 (1942).

[49] Miss. Code Ann. §§ 1476-1478 (1942).

[50] Lewis v. State, 65 Miss. 468, 4 So. 429 (1888).

[51] Miss. Code Ann. § 1478 (1942).

[52] Rice v. Patterson, 92 Miss. 666, 42 So. 255 (1908).

Section 1475.5 is a short but comprehensive statute—the first three subsections of which are based largely on chancery practice. Sub-section 1 is comparable to Section 1290 of the Code of 1942. Sub-section 2 is almost verbatim with Section 1291. Sub-section 3 is the same as Section 1300 except for its first sentence. Sub-section 4 is a paraphrase of Section 1480.

Sub-section 1 of Section 1475.5 abolishes all pleas in the circuit court so far as trials or form are concerned. Any matter that was formerly brought forth by a plea now is simply set forth in the answer, whether it be in abatement or in bar.

Abatement defenses should be stated in separate numbered paragraphs in the first part of the answer to facilitate the disposition of those pleas. Then the answer to the several paragraphs of the declaration should follow, and, finally, any affirmative defenses should be set out and so designated. In at least one type of special action, attachment against debtors, it has been held that the provision of this statute governing answers supersedes Sections 2713 and 2716 requiring pleas in abatement to be filed and disposed of before filing any pleading to the merits.[54]

Subsequently, the Supreme Court appears to have broadened this interpretation so as to construe Section 1475.5 as having supplanted every other section of the Code dealing with pleas in abatement, and also the common law rules governing such pleas.[55] As to whether demurrers may be filed separately or should be included with the answer and heard before going to trial on the merits requires an examination of several sections of the Code. Section 1475.5 does not expressly repeal Sections 1490, 1491, 1492, or 1493 of the Code of 1942, the statutes concerning demurrers. Since repeals by implication are not favored under the rules of statutory construction, and since a demurrer is a form of pleading specified in Section 1519 of the Code of 1942, the only conclusion that may be reached is that a demurrer may be filed and heard separately. Special demurrers have been abolished,[56] and since a general demurrer to the declaration must be on the grounds of no cause of action having been stated[57] and in view of Section 1491 which provides that if the demurrer to the declaration be overruled judgment must be given for the plaintiff for the amount due and interest,[58] the form of pleading here becomes very important. It will not only simplify the pleadings and prevent delay in the trial, but will also prevent a judgment quod recuperet if the demurrer is incorporated in the answer, provided a good and substantial defense is also fully set forth in the answer at the time of filing. If a general demurrer is separately filed and overruled, then, under the statute, the defendant must show by affidavit that he has a good defense and detail it so that the court may consider whether to then let him file an answer. In most instances of this type the time consumed in the separate filing and hearing of demurrers could be better utilized by the attorney.

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[53] Griffith, The New Civil Practice Act—Its Background and Effect, XX Miss. L. J. 1 (1948).

[54] Christopher v. Brown, 211 Miss. 322, 51 So.2d 579 (1951). The decision in this case is an important one so far as the form of answers is concerned since it holds that Section 1475.5 is applicable to at least one type of special action. In light of this holding there appears to be no good reason why Section 1475.5 may not be extended to other special actions.

[55] Home Insurance Co. v. Watts, 229 Miss. 735, 91 So.2d 722, 727 (1957).

CONTENT OF PLEADINGS

A. Declaration

After the styling of the declaration, which includes the designation of the county and court in which the suit is to be filed,[59] together with the names of the parties sued,[60] "the body or statement of the cause of action follows in natural order, and which in every description of action consists of three different points, viz: the right, whether founded upon contract, or tort independent of contract; the injury to such right; and the consequent damages."[61] Or, as our statute states: "A statement of the facts constituting the cause of action."[62]

It is basic that in a declaration only facts should be alleged. But the facts should be sufficient to inform the court so that the judge may determine the applicable law in the case, and sufficient to give the defendant notice of what is meant to be proved[63] so that he may have an opportunity to answer it appropriately.

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[56] Miss. Code Ann. § 1497 (1942).

[57] Aetna Insurance Co. v. Commander, 169 Miss. 847, 153 So. 877 (1934).

[58] This Section applies to actions in both tort and contract. Feazell v. Soltzfus, 98 Miss. 886, 54 So. 44 (1911).

[59] Miss. Code Ann. § 1465 (1942).

[60] For action to be taken where defendants are unknown see Miss. Code Ann. § 1466 (1942).

[61] Chitty on Pleadings 287 (1851).

[62] Miss. Code Ann. § 1464 (1942).

Consequently, arguments,[64] conclusions[65] and matters of law are not properly a part of the declaration and are subject to be stricken on motion.[66]

The pleader is not expected nor required to detail the declaration to such a fine point that every item of evidence is set forth. Only the ultimate facts are essential and the testimony may give the details to establish such facts.[67] Certain facts are matters of common knowledge and may be judicially noticed by the courts. It is not necessary to plead such facts. Conversely, an attempt to plead ignorance of such facts will not aid the pleading in establishing a cause of action.[68]

In actions where such are necessary to disclose the true basis of the case, exhibits are required to be filed with the declaration.[69] Although the Code sections requiring these exhibits are said to announce rules of evidence and not rules of pleading,[70] if these exhibits are filed they become a part of the declaration; they are binding on the pleader and are controlling in the event of a conflict between the exhibit and the declaration.[71] Even though Sections 1469 and 1470 are construed to be mere rules of evidence, if the action is founded on a writing which should be exhibited, a declaration which does not itself contain sufficient allegations to set forth the claim, and merely refers to the exhibit, will not support a judgment by default when the exhibit is not attached.[72] In such instances the exhibit becomes a vital part of the pleading and the case is not fully stated unless it is attached. It appears that it would be better practice to at least give a summary of the exhibit in the declaration unless the nature of the document makes it impractical to do so. In the latter event, the attorney should make certain that the exhibit is attached when it is handed to the clerk for filing.

Where a suit is brought in tort for personal injury with only a general claim for damages, it has been held that it is not error to admit evidence of hospital and doctor bills necessarily incurred as a result of the injury even though such bills were not specifically claimed nor exhibited with the declaration on the theory that the defendant should have asked for a bill of particulars of the injury.[73] This holding is difficult to rationalize in view of the statute and in view of a contrary holding not specifically reversed in *Chapman v. Powers*.[74] The decision in *Currie and Turner Construction Co. v. Bryan,* has resulted in numerous filing of motions for bills of particular which are automatically granted. This sometimes results in a delay in the trial. Thus it would appear that it is to plaintiff's advantage, where there is a claim for special damages of this type, to set them out fully with the exhibits attached in the original declaration. By so doing he will prevent his own trial from being delayed on this ground. It may be observed that this is the type of conflict in court rulings that our Appellate Court should settle at the earliest opportunity.

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[63] New York Indemnity Co. v. Myers, 161 Miss. 784, 138 So. 334 (1931); City of Jackson v. Cook, 214 Miss. 201, 58 So.2d 498 (1952).

[64] Stirling v. Logue, 154 Miss. 812, 123 So. 825, 828 (1929).

[65] Merchants & Farmers Bank v. Bank of Winona, 106 Miss. 471, 64 So. 210 (1914); Horton v. Lincoln County, 116 Miss. 813, 77 So. 796 (1918).

[66] Miss. Code Ann. § 1498 (1942); Supreme Ruling of F. M. P. v. Turner, 105 Miss. 468, 62 So. 497 (1913).

[67] Bennett v. Hardwell, 214 Miss. 390, 59 So.2d 82 (1952).

[68] Newell Contracting Co. v. Flynt, 172 Miss. 719, 161 So. 298 (1935).

[69] Miss. Code Ann. §§ 1469, 1470 (1942).

[70] Western Casualty & Surety Co. v. Fox-Everett, Inc., 223 Miss. 388, 78 So.2d 363 (1955), holding failure to attach does not prevent judgment being taken.

[71] Montgomery v. Hanover Bank, 79 Miss. 443, 30 So. 635 (1901).

[72] Motors Insurance Co. v. Holland, 229 Miss. 262, 90 So.2d 392 (1956).

While it may be considered under either the form or the content of the declaration, a consideration of joinder of causes in one declaration seems more appropriately a part of the substance of the pleadings. The general rule appears to be that although the statute governing declarations is broadly construed, it does not go so far as to permit a *misjoinder* of causes of action. So it has been held that a declaration containing one count in contract and one sounding in tort is a misjoinder of causes of action, and a general demurrer thereto is properly sustained.[75] However, if a general demurrer is not interposed it appears that the case will not be reversed on the ground of misjoinder even though the declaration may be considered improper.[76] And even if independent causes of action are joined in the same count, if they are joined because they concurrently lead to one claim for damages, it is not considered to be a misjoinder.[77] Notwithstanding *Hazelhurst v. Cumberland Tel. and Tel. Co.*, on re-examination, Section 1464 does not indicate that it was drafted to keep in effect the old common law rules of pleading with regard to misjoinder where separate counts are used. This appears especially true in view of Sections 1513, 1516, 1549 and 1550 of the Code of 1942. The more logical rules appear to have been cast aside when the Court in deciding *Hazelhurst v. Cumberland Tel. and Tel. Co.* ignored its ruling in *Miller v. Wesson*.[78] Of course, this is not to say that separate counts should be permitted to be pled where the recovery would be a duplication of damages. An example is a suit on a contract for goods furnished pursuant thereto in one count, and a suit in quantum meruit for the same goods in another count.[79]

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[73] Currie & Turner Construction Co. v. Bryan, 184 Miss. 44, 185 So. 256 (1939).

[74] 150 Miss. 687, 116 So. 609 (1928).

[75] Hazelhurst v. Cumberland Tel. & Tel. Co., 83 Miss. 303, 35 So. 951 (1903). See G. M. & O. R. R. Co. v. Madden, 190 Miss 374, 200 So. 119 (1941). Later pronouncements of this rule were made in Nasif v. Booth, 221 Miss. 126, 72 So.2d 440 (1954); Stringer v. Consumers Credit Corp., 105 So.2d 756 (Miss. 1958).

[76] Simonton v. Moore, 204 Miss. 760, 38 So.2d 94 (1948).

[77] City of Meridian v. Sullivan, 209 Miss. 61, 45 So.2d 851 (1950).

[78] 58 Miss. 831 (1881).

The law presumes damages from the infringement of a legal right,[80] and in general damage claims for money it is not necessary to plead an exact amount.[81] Necessarily, the plaintiff should set forth in the declaration the various elements of damage for which claim is made, and although each element of the damage recoverable may not have to be specially pled,[82] all claims of injury should be set forth fully so far as it is possible to do so without pleading the evidence.[83] Special damages are generally required to be specially pled.[84]

Other than the statutes governing special actions, there are a few statutes requiring specific matters to be alleged in the declaration in particular cases.[85] In many cases the requisites of the declaration may depend partly on some statute. A close examination of the pertinent statutes and the decisions construing them will be necessary before drafting and filing the declaration. While the facts and circumstances necessary to support the action must be fully set forth certainty and accuracy are of utmost importance to proper drafting of the pleadings and their successful utilization. A case may be won in the courtroom, but the groundwork for the victory was long before laid in the tedious investsigation to correctly determine the law and the facts.

B. Answer

Since the abolishment of all pleas in the circuit court, every available defense may be pled in the answer.[86]

Sub-section 1 of Section 1475.5 provides a means of setting up pleas which go to the entire present cause of action so that they may be separately heard and disposed of before the principal trial on the merits. Any such matter should be placed in the answer, as stated in the act, "in such manner as to be clearly distinct and readily separable." While this position in the answer may be a matter of form, it is important, if the defendant desires to move for a separate hearing on such matter, for its substance to be separable from the answer to the allegations of the declaration.

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[79] Carter v. Collins, 151 Miss. 1, 117 So. 336 (1928).

[80] Doherty v. Miss. Power Co., 178 Miss. 204, 173 So. 287 (1937).

[81] Henry v. Shepherd, 52 Miss. 125 (1876).

[28] Following are some instances of damages not required to be specially pled: (Impairment of earning capacity), Miss. Cent. R. v. Smith, 176 Miss. 306, 168 So. 604 (1936), *cert. den.* 299 U. S. 518 (1936); (Inconvenience), Critz v. So. Bell Tel. & Tel. Co., 178 Miss. 323, 173 So. 430 (1937); (Punitive), Laurel Equipment Co. v. Matthews, 218 Miss. 718, 67 So.2d 258 (1953); (Damages as may be presumed necessary to result from a breach of contract), Vicksburg & Miss. R. R. Co. v. Ragsdale, 46 Miss. 458 (1872): See also Miss. Code Ann. § 1453 (1942).

[83] Although held sufficient without a bill of particulars having been requested, for a case in which the damages were too generally set forth, see Gulf Research Development Co. v. Linder, 177 Miss. 123, 170 So. 646 (1936). Then compare with Pigford v. House, 149 Miss. 692, 115 So. 774 (1928).

[84] Vicksburg & Miss. R. R. Co. v. Ragsdale, 46 Miss. 458 (1872).

[85] Miss Code Ann. § 1471 (1942), governing declarations on bonds with a condition; Miss. Code Ann. § 1472 (1942), requiring a description of the land in actions of trespass to land; Miss. Code Ann. § 1473 (1942), concerning declarations for libel or slander.

[86] Miss. Code Ann. § 1475.5, sub section 1 (1942).

Inconsistent defenses are permissible whether heretofore presented by plea in abatement or in bar. Where inconsistent defenses are pleaded, neither may be construed as a waiver of the other, nor may one be used as an admission to destroy the other.[87]

Although Section 1475.5 appears to permit all types of defenses, inconsistent or otherwise, the Legislature left Sections 1479 through 1485 of the Code of 1942 in effect, all of which relate to defensive pleading. Later, in 1952, Section 1483.5 relating to counter-claims was added. The result is that the applicable sections not only must be read together with Section 1475.5, but the decisions thereunder must be carefully studied before drafting an answer. For example, under Section 1481, "Where a mutual indebtedness exists between plaintiff and defendant, the defendant may plead and set off . . . ." The interpretation of Section 1481 is that a set-off may only be pleaded where the suit arises by contract and the amount claimed is certain.[88] In 1950, tort claims arising out of the same transaction could not be set off by the defendant against the plaintiff's tort claims,[89] but the legislature by adding Section 1483.5 enabled counterclaims arising out of or connected with the action in either tort or contract, whether liquidated or unliquidated, to be filed with the answer.[90] A further re-examination of Section 1475.5 by our Appellate Court may result in a more liberal interpretation as to what is meant by paragraph 1 wherein all pleas are abolished and all defenses heretofore presented by plea are permitted to be made in the answer, whether consistent or not. This statute appears to be broad enough to permit any claims a defendant may have against a plaintiff to be adjudicated in the same suit with plaintiff's claim.

While the intention of the legislature is plainly set forth in Section 1475.5, the question as to how far this section affects special actions has not yet been finally determined by the Supreme Court. An opportunity to pass on whether this Section abolishes pleas of not guilty in replevin actions was partially by-passed by the court in *McCaskill v. Little*.[91] In view of this action by the Appellate Court, the safest procedure in special actions is to follow the old form set up in the Code because these sections were not specifically repealed by Section 1475.5.

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[87] Morris v. Henderson, 37 Miss. 492 (1859). This decision was rendered in a case which was brought under the pleading act of 1850. A reading of the opinion will show the close similarity of Section 1475.5 to the pleading act of 1850.

[88] Lancaster v. Jordan Auto Co., 185 Miss. 530, 187 So. 535 (1939).

[89] Vines v. Perry, 208 Miss. 869, 45 So.2d 734 (1950).

[90] See City of Oxford v. Spears, 228 Miss. 433, 87 So.2d 914 (1956).

[91] 214 Miss. 331. 58 So.2d 801 (1952); cf. Home Insurance Co. v. Watts, 229 Miss. 735, So.2d 722 (1957), *suggestion of error sustained on other grounds,* 93 So.2d 848 (Miss. 1957).

Sub-section 2 of Section 1475.5 hardly needs discussion because it is plainly stated and not subject to misunderstanding. It does not need to be followed, and if the plaintiff drafts his declaration in a proper manner it will facilitate the answer by the defendant. The first sentence requires the defendant to answer fully all the allegations of the declaration,[92] ". . . without being specially interrogated." This latter procedure, permissible under Section 1714 of the Code of 1942, is generally seldom used by either side. However, where the answer fails to comply with the statute and is comparable to a plea of general issue, interrogatories may be used to "dig out" such knowledge as the defendant may have. Conversely, the same procedure may be used against a plaintiff where the allegations of the declaration are too general. The advantage of knowing to what each party will testify in advance sometimes eliminates the need for trial, and where there is a trial the use of interrogatories permits a more expeditious handling of the case.

Under Sub-section 2 the defendant must either admit in whole or in part, or deny in whole or in part each allegation of the declaration. Matters in confession and avoidance, of course, are affirmatively pled. Since this paragraph of the statute was taken from Section 1291 of the Code of 1942 governing chancery pleading, decisions construing that part of the Section will be applicable in circuit court. Thus, neither an evasive answer which does not deny the allegations of the declaration,[93] nor an answer not specifically denying the allegations of the declaration but which states that defendant had no personal knowledge thereof,[94] nor an answer stating defendant is not advised as to certain allegations of the declaration and demanding strict proof,[95] are sufficient to put plaintiff to proof of such allegations. As to the parts of the declaration not admitted, as stated by Justice Chalmers in *Mead v. Day:*[96]

> "The true meaning of the statute, we think is this: There must be a denial not necessarily of the facts, unless they are within the personal knowledge of the respondent, but of all knowledge, information and belief. Where knowledge and information are both denied it would, perhaps, be unnecessary to make any averment as to belief, since belief, without either information or knowledge, is necessarily worthless. Whenever the denial is not of this character—

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[92] While not wholly applicable, because of the fact that Section 1475.5 is largely taken from our Code Sections governing chancery pleading, Griffith, Mississippi Chancery Practice, c. 15 (Answers) (1950), may be read and used to great advantage in circuit court pleading.

[93] Applewhite v. Foxworth, 79 Miss. 773, 31 So. 533 (1902).

[94] Hinton v. Mills, 120 Miss. 388, 82 So. 264 (1919).

[95] Jones County Land Co. v. Fox, 120 Miss. 798, 83 So. 241 (1919).

[96] 54 Miss. 58, 63 (1876).

> that is to say, whenever there is an omission to deny the facts and a failure to negative both knowledge and information in relation to time - - the complainant, instead of being forced to resort to his exceptions may treat the allegations of the bill as admitted."

Sub-section 4 of Section 1475.5 is Section 1480 of the Code of 1942 rewritten so as to comply with the new form of pleading of defenses in the answer. Since the plaintiff is required to respond to this affirmative matter, except where the original declaration anticipates such a plea and the matter is then at issue,[97] the affirmative defense should be separate from the several admissions or denials of the allegations of the declaration so that it can be easily recognized as an affirmative matter in avoidance. Decisions construing Section 1480 of the Code of 1942 are likewise applicable to Sub-section 4:

> "While as a rule great liberty is allowed in pleading and procedure, this statute is mandatory and must be strictly complied with. The effect of Section 686 (Code of 1892) is to require every affirmative matter to be pleaded specially or given notice of so as to distinctly inform the opposite party of the precise ground of contest on which he is to be met by his adversary."[98]

The penalty for failure to properly plead any affirmative defense which defendant may have will be a denial by the Court of its consideration in the trial, and the receiving of evidence and the granting of instructions thereon in spite of such failure to plead is reversible error.[90]

A part of the discussion of the content of an answer normally would be devoted to Section 1483.5 on the subject of counterclaims. However, that statute has been fully, comprehensively and most ably discussed in a recent article.[100] The inclusion of that article in any symposium on the circuit court would be most appropriate. Therefore, instead of trying to duplicate it in brief, reference is made to the article for any problems relating to the filing of counterclaims.

CONCLUSION

"The object of pleading is to state in concise form, and by positive averment, the facts constituting a cause of action and the facts constituting the excuse, justification or grounds of defense. This written controversy or altercation is continued until the parties come to some material matter, affirmed on the one side and denied on the other, fit to dispose of the suit on its merits."

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[97] Anderson v. Laurel Oil & Fertilizer Co., 228 Miss. 95, 87 So.2d 556 (1956).

[98] M. B. R. Co. v. Grant, 86 Miss. 565, 38 So. 502 (1905), citing Tittle v. Bonner, 53 Miss. 578 (1876). And the pleading should show clearly the grounds upon which his defense rests, Simmons v. Chrysler, 197 Miss. 547, 20 So.2d 85 (1944).

[99] Ellis v. Hubbard, 27 Miss. 837, 87 So.2d 251 (1956). For converse, see Calvert Fire Ins. Co. v. Swain, 217 Miss. 773, 65 So.2d 253 (1953).

[100] Daniel, The Miss. Counter Claim Statute, XXV Miss. L. J. 252 (1954).

"At common law the canons of pleading were meant to guide and lead the parties to this result - - a material issue of law or fact. Our statutes have enlarged the power of the courts to extend to litigants a liberal helping hand to put their pleadings in such shape as that the real, true merits of complaint or defense may be brought out and presented for trial and adjudication."[101]

The reference by Justice Simrall to the power of the courts, "to extend to litigants a liberal helping hand" is about the limit of the court's authority, and, generally, this may be done only in term time unless both sides agree otherwise. The latter is the exception to the rule. Since the courts have surrenderd their authority to the legislature to make their rules for them, a change in legislation is sorely needed to give the court broader powers to deal with pleadings, with particular reference to pre-trial hearings and authority to act in vacation as in term time. Other progressive changes in judicial administration are needed, but are not pertinent to this discussion.

We have reached the era when, for the benefit of the legal profession, lawyers, generally, need to realize that their pleadings are not comic opera scripts where each side may try to best his adversary with absurdity. Declarations and answers should state factual truth and stay within the bounds of factual reality. Defendant's attorneys who deny everything when they know that at least a part of the facts are not in dispute are subject to criticism, but they are no more to blame for this type situation than the plaintiff's attorneys who claim extravagant injuries and damages, knowing all the time that their clients have not been so injured, and that a normal jury would not return any such verdict.

It is difficult to wipe from the public's mind the continued jokes and cynical stories about shyster lawyers when the type pleadings referred to are read in the hearing of layment and jurymen. They believe that law is what the lawyers make it, and sometimes justly conclude that if the pleadngs are not strictly honest neither is the man who prepares them.

Although neither the declaration nor the answer are sworn to, when signed by the attorney or signed at his direction after the pleadings are drafted by him, they are his affirmation that under his oath of office,[102] and under the Canon of Ethics of the Mississippi Bar Association[103] no part of the pleadings, either of his own knowledge or on information, is untrue. This, too, is an important part of the form and content of pleadings.

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[101] Justice Simrall in Weathersby v. Sinclair, 43 Miss. 189 (1870).

[102] Miss. Code Ann. § 8664 (1942), which is in part "I do solemnly swear I will use no falsehood."

[103] As amended May 7, 1950 by the Miss. Bar Commissioners and approved by the Supreme Court of Mississippi. See records of Mississippi Bar Asociation, 1950.

PROCESS SUFFICIENT TO REQUIRE A DEFENSE OR DEFAULT JUDGMENT

*Henry L. Rogers**

INTRODUCTION

The various Mississippi Statutes which deal with the subject of process have been compiled piecemeal, and the whole subject should be revised and correlated by the Legislature. The Bar Association is now recommending certain changes in our law to conform with the newly enacted statutes on pleadings, but until the entire subject is renovated, we will continue to have a different method of acquiring jurisdiction over many defendants of the same class.

It may be helpful at the outset to mention certain guide rules that are useful in evaluating the essential need of process and the manner of perfecting process upon defendants in actions at law. They are:

> *a.* The principle object and purpose of process is to give the party to whom it is addressed notice of the proceedings against him,[1] and any process that substantially gives notice under the particular statutory method is ordinarily considered good process.[2] However, "notice" means the notice provided by law and the mere fact that a defendant has actual notice of an action against him is not sufficient process to acquire jurisdiction over him.[3] It is therefore evident that any judgment rendered without such notice is absolutely void.[4]
>
> *b.* The notice must give to the party to whom it is addressed an opportunity to be heard before a competent tribunal vested with jurisdiction of the subject matter of the cause.[5] Section 14 of the Mississippi Constitution of 1890 guarantees that no man will be condemned nor divested of his rights until he has had an oppor-

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[1] Hall v. Gulf South Utilities, 96 F. Supp. 351 (S.D. Miss. 1951); 42 Am. Jur., Process § 3 (1957); Brown v. Levee Commissioners, 50 Miss. 468 (1874).

[2] McAllum v. Spinks, 129 Miss. 237, 91 So. 694 (1922); Dunn v. Simms, 218 Miss. 227, 67 So.2d 261 (1953); Alabama & V. Ry Co. v. Bolding, 69 Miss. 255, 13 So. 844 (1891).

[3] Burns v. Burns, 133 Miss. 485, 97 So. 814 (1923); McCoy v. Watson, 154 Miss. 307, 122 So. 368 (1929); Falconer v. Frazier, 7 Sm. & M. 235 (Miss. 1846).

[4] Jack v. Thompson, 41 Miss. 49 (1866); Duncan v. Gerdine, 59 Miss. 550 (1882); Prentiss v. Mellen, 1 Sm. & M. 521 (Miss. 1844); Hemphill v. Hemphill, 34 Miss. 68 (1857).

[5] Gordon v. Gordon, 196 Miss. 476, 17 So.2d 191 (1944); 17 Am. Jur., Divorce and Separation § 685 (1938); 42 Am. Jur., Process § 4 (1957); 12 Am. Jur., Constitutional Law § 573 (1957); Howard Lumber Co. v. Hopkins, 136 Miss. 237, 101 So. 363 (1924).

tunity to be heard, and no judgment will be valid or binding upon him without due process of law;[6] nor can the Legislature pass a law depriving the citizen of the right to notice and the right to be heard.[7] The process must, therefore, fix a time and place for the defendant to appear and defend the action or proceeding which has been instituted against him.[8]

c. Defective or irregular process, unless it is void, may be amended.[9] Defective process is either void or voidable. If the process is voidable, that is to say irregular, but gives jurisdiction under the first two rules,[10] (as can readily be determined from the process itself), it may be amended.[11] For example, the undated return of an officer may be amended.[12] Section 1873, Code of 1942 uses the words, "Any matter required to be inserted or indorsed on any process may be amended on such terms as the court may deem proper."[13] On the other hand, void process cannot be amended.[14] It has been said, "Void process may be divided into two classes; namely, (a) process which is issued in violation of a statute prohibiting it,[15] and (b) process which is not in substantial compliance with the statutory requirements." The former cannot be amended and cannot be cured by waiver, consent, or agreement. A defect of the latter may be waived although it cannot be cured by amendment.[16] Section 1896, Code of 1942 excepts certain persons from process under certain circumstances.

ISSUANCE OF PROCESS

Process will not ordinarily be issued until a declaration has been filed.[17] It has been stated, "A summon shall not issue in any case . . . until the declaration . . . shall be filed."[18] A judgment will not be allowed to stand if process is issued before the declaration is filed;[19] nor can a waiver of process be filed until after the date of the filing of the declaration.[20]

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[6] Rice v. McMullen, 207 Miss. 706, 43 So.2d 195 (1949).

[7] Donovan v. Vicksburg, 29 Miss. 247 (1855); Singuefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931); Jack v. Thompson, note 4 supra.

[8] Britton v. Magnolia Casket and Supply Co., 210 Miss. 264, 49 So.2d 404 (1950); 42 Am. Jur., Process § 14.

[9] Reed v. General Motors Acceptance Corp., 228 Miss. 121, 87 So.2d 95 (1956).

[10] Allen v. Dicken, 63 Miss. 91 (1885).

[11] Lumpkin & Sons v. Russell, 108 Miss. 742, 67 So. 185 (1915).

[12] Betts v. Baxter, 58 Miss. 334 (1880).

[13] Dunn v. Sims, 218 Miss. 227, 67 So.2d 261 (1953).

[14] Joiner v. Bank, 71 Miss. 382, 14 So. 464 (1893); Johnson v. State, 202 Miss. 233, 31 So.2d 127 (1947).

[15] Claunch v. State, 208 Miss. 767, 45 So.2d 581 (1950).

[16] Miss. Code Ann. § 1872 (1942).

[17] Shackleford v. N. Y. Underwriters Ins. Co., 189 Miss. 896, 193 So. 31 (1940); Miss. Code Ann. § 1463 (1942).

[18] Merritt v. White, 37 Miss. 438 (1859); Nelson v. Rogers, 41 Miss. 635 (1868); Miss. Code Ann. § 1845 (1942).

[19] Frederick Smith Enterprise Co. v. Lucas, 204 Miss. 43, 36 So.2d 812 (1948).

There are certain proceedings where our law permits the filing of the declaration after process has been issued or other pleadings filed, but these are special statutory proceedings and are usually based on common law. They are: replevin;[21] garnishment on written suggestion;[22] eminent domain process issues from office of circuit clerk but is tried de novo in the circuit court on appeal;[23] quo warranto;[24] petition for mandamus or probation in lieu of declaration;[25] affidavit to establish liens.[26] The Judges of the Supreme Court and trial judges may issue remedial writs before pleadings have been filed in the trial court.[27]

FORM OF PROCESS

The style of process shall be, "The State of Mississippi," and shall issue over the name of the clerk of the court with the seal of his office affixed, and shall bear the date of its issuance.[28] This Code section does not apply to any process except in the chancery, circuit and county courts.[29] It excludes all other statutory process such as :justice of the peace process,[30] disbarment proceedings,[31] notices of Board of Supervisors,[32] municipal notices,[33] ordinary warrants for arrest,[34] notices of supervisors to equalize tax rolls.[35]

Although strict adherence to form is not absolutely necessary in issuing process to a defendant,[36] the process must bear the seal of the court[37] unless it is shown on the writ that there is no seal,[38] and it must be dated.[39] It must be issued in the name of the clerk.[40] Process in the name of the clerk signed by another is good process provided it is done with the consent of the clerk.[41] The process issued by a deputy must be in the name of the clerk.[42] The process must have a return date,[43] and process returnable to a past due date is voidable,[44] but process returnable to a term of court is sufficient because the public has statutory notice of the terms of court.[45]

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[20] Miss. Code Ann. § 1872 (1942).
[21] Miss. Code Ann. § 2859 (1942).
[22] Jeffries v. Harvie, 38 Miss. 97 (1859); Miss. Code Ann. § 2783 (1942).
[23] Miss. Code Ann. §§ 2751, 2766(c) (1942).
[24] Miss. Code Ann. §§ 1121, 1126 (1942).
[25] Miss. Code Ann. §§ 1112, 1113 (1942).
[26] Christian v. O'Neal, 46 Miss. 669 (1872); Miss. Code Ann. §§ 341, 346, 350 (1942).
[27] Miss. Code Ann. § 1657 (1942).
[28] Miss. Code Ann. § 1844 (1942).
[29] Martin v. State, 190 Miss. 32, 199 So. 98 (1940).
[30] Mathews v. State, 134 Miss. 807, 100 So. 18 (1924).
[31] Ex-parte Cashin, 128 Miss. 244, 90 So. 850 (1922).
[32] Mullens v. Lyle, 183 Miss. 297, 183 So. 696 (1938).
[33] Miss. Power & Light Co. v. Batesville, 187 Miss. 737, 193 So. 814 (1940).
[34] Cooper v. State, 193 Miss. 672, 10 So.2d 764 (1942).
[35] Clanton v. Callender, 36 So.2d 140 (Miss. 1948).
[36] Hawkins v. McAlister, 86 Miss. 84, 38 So. 225 (1905).
[37] Pharis v. Conner, 3 Sm. & M. 87 (Miss. 1844); Burton v. Cramer, 123 Miss. 848, 86 So. 578 (1920); McAllum v. Spinks, supra note 2; 42 Am. Jur., Process § 12 (1957).
[38] Bruton v. Cramer, supra note 37.
[39] Miss. Code Ann. § 1844 (1942).
[40] Felder v. Merdith, 1 Walker 447 (Miss. 1831); 42 Am. Jur., Process § 10 (1957).
[41] Pharis v. Conner, supra note 37.

The process must command an officer to summon the person or persons named in the writ.[46] Mere clerical errors in the process, which are not confusing and do not leave in doubt the command of the writ, may be disregarded.[47] Although the process should be addressed to some officer as a matter of proper form,[48] under our law process may be good though it is not addressed to any officer.[49]

The process must give notice to the defendant of the time and place he is to appear.[50]

WHEN RETURNABLE

The process shall be made returnable to the first day of the term. The return term being that term, "wherein the writs in the action are all returned served or at which all the parties have entered their appearance."[51] Unless the process is executed five days before the return term, it shall require the appearance of the party at the next regular succeeding term of court.[52] If the clerk issues the process within five days before a term of court, he shall make it returnable to the next regular succeeding term of court.[53] When the process is served within five days, a judgment thereon is erroneous and may be set aside.[54] Process returnable instanter during a term of court is a nullity and not amendable.[55] Process returnable to a past due date is voidable,[56] but process returnable to an impossible date is void.[57] Process returnable before the "judge of our circuit court," is not void because of the surplus words "judge of our," since it is returnable before the "circuit court."[58] In computing the time required by statute for service of process, the day of serving the process shall be excluded and the day of the required appearance included,[59] unless it falls on Sunday, in which case Sunday will also be excluded.[60] Cases on appeal from a lower court are returnable to and triable at the first term after the appeal is perfected.[61]

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[42] Miss. Code Ann., § 1844 (1942); 42 Am. Jur., Process § 8 (1957).

[43] Miss. Code Ann. § 1848 (1942).

[44] Hendricks v. Pugh, 57 Miss. 157 (1879); Howard Lumber Co. v. Hopson, 136 Miss. 237, 101 So. 363 (1924) (this case holds that process returnable to a past date may be amended); Kelly v. Harrison, 69 Miss. 860, 12 So. 261 (1892); 42 Am. Jur., Process § 8 (1957).

[45] Miss. Code Ann. § 1519 (1942).

[46] Miss. Code Ann. § 1845 (1942); 42 Am. Jur., Process § 13 (1957).

[47] 42 Am. Jur., Process § 8.

[48] Miss. Code Ann. § 1845 (1942).

[49] Hawkins v. McAlister, supra note 36; Miss. Code Ann. § 1872 (1942).

[50] 42 Am. Jur., Process § 14.

[51] Thornton v. Fitzbaugh, 10 Sm. & M. 438 (Miss. 1848). But the plaintiff may elect to take judgment against those persons properly summoned where there are two or more defendants and additional process is issued for those not summoned. See Miss. Code Ann. § 335 (1942).

[52] Miss. Code Ann. § 1848 (1942).

[53] Robertson v. State, 87 Miss. 285, 39 So. 478 (1905); Thornton v. Fitzbaugh, supra note 51.

[54] See note 52 and 53 supra.

[55] Joiner v. Delta Bank, 71 Miss. 382, 14 So. 464 (1893).

[56] Hendricks v. Pugh, supra note 44.

[57] Johnson v. State, 202 Miss. 233, 31 So.2d 127 (1947).

PROCESS, BY WHOM EXECUTED

Sheriff or Deputy. The process of the circuit court shall "command the officer to summon the defendant,"[62] and is usually addressed to "any lawful officer." Although our Mississippi statute does not state to whom the process shall be addressed,[63] as do many of our criminal statutes,[64] the sheriff is the executive officer of the county, and, as such, is required to execute all orders of the court directed to him[65]—thus either he or his deputy[66] must issue such orders. The sheriff is liable both criminally[67] and civilly[68] for his failure to do so.

Notices shall also be served by the sheriff or his deputy.[69] The sheriff may serve process on his deputy, but the deputy cannot serve process upon the sheriff;[70] although under a prior decision an officer could not serve process unless it was addressed to him[71] we now have a statute that expressly states, "process shall be good though not directed to any officer."[72] In the event of the death of the sheriff, his deputy will continue to carry out the duties of this office until the office is filled by appointment.[73] The deputy cannot act for the sheriff when the sheriff is an interested party.[74]

Coroner. Under Section 3906, Code of 1942, the coroner is required to assume the duties of the sheriff: when there is a vacancy in the office of the sheriff and there is no deputy to act as authorized by law;[75] or in the event of the death of the sheriff; or when the sheriff is a party or has an interest in any suit; or when the sheriff is incapable or unfit to act in any particular case; or when there is a warrant for the sheriff's arrest, duly executed by the proper officer; or the sheriff is subject to arrest.

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[58] Dunn v. Simms, 218 Miss. 227, 67 So.2d 261 (1953); 42 Am. Jur., Process § 22 (1957); see annotations 154 ALR 1021 (1945).

[59] Miss. Code Ann. § 21 (1942).

[60] Nickles v. Kendrick, 76 Miss. 334, 24 So. 534 (1899); G. M. & O. Ry. Co. v. Forbes, 228 Miss. 134, 87 So.2d 488 (1956).

[61] Miss. Code Ann. § 1201 (1942).

[62] Miss. Code Ann. § 1845 (1942).

[63] Miss. Code Ann. § 1844 (1942).

[64] Miss. Code Ann. §§ 2605, 2614, 5856, 6837 (1942).

[65] Miss. Code Ann. §§ 4240, 4241 (1942); 42 Am. Jur., Process § 25 (1957).

[66] Henry & Hoyle v. Halsey, 5 Sm. & M. 573 (Miss. 1845); Miss. Code Ann. §§ 4235, 4239, 4241 (1942).

[67] Miss. Code Ann. §§ 2298, 4053, 4241 (1942).

[68] Miss. Code Ann. §§ 4049, 4242, 4244, 4245, 4246, 1878, 4241 (1942).

[69] Miss. Code Ann. § 1876 (1942).

[70] Ford v. Dryer, 26 Miss. 243 (1853).

[71] Arnold v. Wynn, 26 Miss. 338 (1853).

[72] Hawkins v. McAlister, 86 Miss. 84, 38 So. 225 (1905); Keys v. State, 155 Miss. 574, 124 So. 789 (1929); Miss. Code Ann. § 1871 (1942).

[73] Miss. Code Ann. § 4046 (1942).

[74] McLeod v. Harper, 43 Miss. 42 (1870); Dyson v. Baker, 54 Miss. 24 (1876).

The coroner is not a peace officer with authority to act generally and can only act when the proper officer is not available or is incapacitated as above mentioned.[76] The coroner is subject to the same penalties as the sheriff for failure to perform the duties of the sheriff.[77] In the event there is no coroner in the county, the circuit judge or chancellor, upon proper information, may appoint some qualified elector to perform the duties of the coroner.[78]

Justice of the Peace. If there be no sheriff or coroner in the county, or if they are parties, or interested otherwise in a suit, the process may be directed to a justice of the peace, who is bound to execute the process under the same penalties as those that bind the sheriff.[79] Process addressed to an officer interested in a case will be quashed.[80] The justice of the peace is not authorized under the above statute to execute process he has issued.[81]

Special Officers, appointed to serve process. We have already mentioned the judge's appointment of a qualified elector to act as a coroner,[82] but there is another statute which authorizes the circuit judge to order process to be directed to any disinterested and proper person when the sheriff and coroner are disqualified, or there is a vacancy in said offices; or "or for other good cause shown."[83] This application must be made in writing and filed with the clerk and an order duly entered by the judge.[84] We have not been advised by our Supreme Court as to what is meant by "or for other good causes shown," as expressed in the statute, but the dissenting opinion in the *Claunch* case is enlightening on the authority of the justice of the peace to appoint persons to serve process.[85] It has been said that "good cause" is not arbitrary action,[86] but it would appear that "good cause" would indicate a judicial determination on evidence offered upon such application and would certainly involve judicial discretion.[87] Since these words, "good cause" are in addition to the disqualification of the officers of the vacancy of the office as expressed in the statute,[88] it is probable that they could mean "an emergency" as expressed in another section of the Code;[89] or "whenever in the opinion of the court the public interest will be subserved thereby," as expressed in still another Code section.[90] It has been said that the court has inherent power to do all things that are reasonably necessary for the administration of justice and could exercise such power over the court's process to prevent abuses, and it has been further stated that such power does not depend upon express words in the Constitution nor the will of the Legislature.[91]

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[75] When there is a deputy he acts. See note 73 Supra.

[76] Millwood v. State, 198 Miss. 485, 23 So.2d 496 (1945).

[77] Miss. Code Ann. § 3906 (1942).

[78] See note 77 supra.

[79] Miss. Code Ann. 1879 (1942).

[80] McLeod v. Harper, 43 Miss. 42 (1870).

[81] McDugle v. Filmer, 79 Miss. 53, 29 So. 996 (1901).

[82] See note 77 supra.

[83] Miss. Code Ann. § 1877 (1942).

[84] Claunch v. State, note 15 supra.

[85] Claunch v. State, ibid; Miss. Code Ann. § 1814 (1942).

[86] Cherry v. Bivens, 185 Miss. 329, 187 So. 525 (1939).

[87] In Re Bishop, 211 Miss. 518, 52 So.2d 18 (1951).

HOW PROCESS IS EXECUTED

The process shall be executed by the officer in one of the following modes.[92]

First: The process shall be served upon the defendant personally if he can be found in the county by handing him a copy of the process.[93] A mere reading of the process to defendant is not sufficient service of process,[94] but where an officer offered the process to the defendant and he refused to accept it and would not permit the officer to read it to him, further execution of the process was not necessary.[95] The plaintiff can, however, obtain additional process until the defendant who has refused the process is properly served.[96]

Second: If the defendant cannot be found in the county,[97] the officer may leave a copy of the process at his usual place of abode[98] with his wife or some other person above the age of sixteen years who is a member of his family and willing to receive the process.[99] A process returned stating that it had been left with "his son" is not sufficient;[100] and a married sister of an absent property owner is not a member of her family,"[101] nor is process served upon a clerk at defendant's store sufficient.[102]

Third: If the defendant cannot himself be found and if no person of his family aged sixteen years and above can be found at his usual place of abode.[103] A substantial compliance with this method of execution is all that is required, but it must be substantial.[104] It must be remembered that any service of process other than personal delivery of process is a "substituted service," and is a departure from the common law; therefore, such statutes are strictly construed.[105] The meaning of the words, "place of abode," "other persons above the age of sixteen," "being one of his family," and "willing to receive," are all judicial questions to be determined in each case.[106]

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[88] Miss. Code Ann. § 1875 (1942).
[89] Miss. Code Ann. § 1814 (1942).
[90] Miss. Code Ann. § 4235 (1942).
[91] 14 Am. Jur., Courts § 171 (1957).
[92] At one time in Mississippi, process marked "executed" was a sufficient return.
[93] Miss. Code Ann. § 1859 (1942).
[94] French v. State, 53 Miss. 651 (1876); Carrollton Hardware and Implement Co. v. Marshal, 117 Miss. 224, 78 So. 7 (1918).
[95] Story v. Ware, 35 Miss. 399 (1858). See paragraph, "Kept off by force."
[96] Miss. Code Ann. § 1874 (1942).
[97] Griffith, Mississippi Chancery Practice, at p. 226, note 28 (1950). Judge Griffith in his excellent work has condemned one trip "not found" returns of the officer.
[98] 42 Am. Jur., Process § 61.
[99] Miss. Code Ann. § 1859 (1942).
[100] Glenn v. Wragg, 41 Miss. 654 (1868).
[101] Hendricks v. Kellogg, 116 Miss. 22, 76 So. 746 (1917).
[102] Ford v. Britton, 41 Miss. 651 (1868).

WHEN THE DEFENDANT IS NOT FOUND IN THE COUNTY

When the officer fails to find the defendant, the plaintiff may cause new and additional process to be issued without formal order of the court until the defendant is found; or plaintiff may have a testatum writ issued to another county when the defendant has gone to another county after the filing of the declaration and the service of process. The plaintiff may cause an attachment to issue against the estate of the defendant if he is "not found,"[107] but the record must show in attachment proceedings that the action was rightfully commenced" and that the defendant is "not found in the county."[108]

WHEN THE OFFICER IS KEPT OFF BY FORCE

When the sheriff is prevented, by force, from serving process he may call to his aid the "power of the county" if necessary to carry out the command of the writ;[109] and when the sheriff has returned on the process the fact that he was prevented from executing the process, the plaintiff may cause the issuance of additional process, or he may proceed against the defendant as if the defendant had been duly served with process.[110]

OFFICER'S RETURN OF PROCESS

When the officer receives the process issued by the clerk, he is required to mark on the process the date he received it.[111] He shall forthwith serve the process[112] and make his written return thereon, on or before the return date mentioned in the process.[113] His return should be a detailed written history of his acts in serving the process.[114] He is liable civilly and criminally if he fails to do so.[115]

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[103] Miss. Code Ann. § 1859 (1942); Griffith, Mississippi Chancery Practice, at p. 226. Judge Griffith calls attention to the fact that the return must negative the first two requirements of this mode of service.

[104] Moorhead v. Caffhe, 52 Miss. 161 (1876); French v. State, 53 Miss. 651 (1876); Rigby v. Lefevre, 58 Miss. 639 (1881).

[105] 42 Am. Jur., Process § 61.

[106] Bustamente v. Bescher, 43 Miss. 172 (1870); 42 Am. Jur., Process §§ 61, 62 and 63 (1957).

[107] Miss. Code Ann. § 1850 (1942).

[108] McNair v. Kaiser, 62 Miss. 783 (1885).

[109] Miss. Code Ann. § 4255 (1942).

[110] Story v. Ware, 35 Miss. 399 (1858); Miss. Code Ann. § 1874 (1942).

[111] Miss. Code Ann. § 1862 (1942).

The form of the officer's return is set out in the Code of 1942, and it should be noted that the last paragraph of this Section requires the officer to negative his ability to make the preceding return or returns.[116] It is not enough to simply state, "executed by personal service,"[117] or "read to defendants;"[118] or "left copy at boarding house of defendant;[119] or "left copy with his wife."[120] The officer is required to state exactly the manner in which he executed the process.[121] The court must be fully informed by the process of the acts of the officer,[122] but failure to state facts may not vitiate a judgment.[123]

Alias Process Return. When the officer fails to return the first process and alias process is issued, the officer shall not execute the second process but shall return the first process issued and executed by him, if he has it, and if not, he shall return the second process with the returns showing the execution of the first process, and proceedings will be made as if the first process had been duly returned.[124]

RETURN OF THE OFFICER CHALLENGED

The return of the officer may be challenged in the same action by either of the parties who show it to be untrue, but the officer himself shall not be permitted to question its truth.[125] The parties may offer proof to show that the return is incorrect.[126] The method used heretofore to attack the officer's return has been by plea in abatement on issue joined and a hearing before a jury,[127] but under our modern practice the defense is set out in the answer and reached by motion to hear separately[128]—but this is discretionary with the court.[129] The trial courts have generally heard evidence on the motion without a jury, as is done in the chancery court,[130] in order to first determine whether or not there are sufficient facts at issue on the motion to bar the action, as an aid to the trial judge.[131]

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[112] Taylor v. State, 137 Miss. 217, 102 So. 267 (1924); 42 Am. Jur., Process § 26 (1957).

[113] Ibid.

[114] Moore v. Coats, 43 Miss. 225 (1870); Rankin v. Dulaney, 43 Miss. 197 (1870); Woodliffe v. Conner, 45 Miss. 552 (1871); Dogan v. Barnes, 76 Miss. 566, 24 So. 965 (1899).

[115] Miss. Code Ann. §§ 1862, 4241, 4242 (1942).

[116] Miss. Code Ann. § 1861 (1942).

[117] Dogan v. Barnes, supra note 114.

[118] Carrollton Hardware and Implement Co. v. Marshal, supra note 94.

[119] Smith v. Cohea, 3 How. 35 (Miss. 1838).

[120] Mullens v. Sparks, 43 Miss. 129 (1870).

[121] Merritt v. White, 37 Miss. 438 (1859); Burrus v. Burrus, 56 Miss. 92 (1878).

[122] Rankin v. Dulaney, supra note 114.

[123] Reed v. General Motors Acceptance Corporation, 228 Miss. 121, 87 So.2d 95 (1956).

[124] Miss. Code Ann. § 1875 (1942).

[125] Duncan v. Geraldine, 59 Miss. 550 (1882); Miss. Code Ann. § 1880 (1942); 42 Am. Jur., Process § 127 (1957).

[126] City of Meridian v. Trussell, 52 Miss. 711 (1876).

[127] Mayfield v. Barnard, 43 Miss. 270 (1870).

AMENDMENT OF RETURNS

There is a presumption that the officer served the proper person and that the returns of the officer are correct.[132] The sheriff cannot testify to contradict his returns.[133] The officers' returns may be amended to show the facts even after motion has been made to quash the writ,[134] and, in some instances, after judgment.[135] The court may require the officer to make his returns,[136] which may be set aside as irregular or amended on such terms as the court deems proper.[137]

The appearance of the defendant, however, waives defective process,[138] and where the process is quashed on motion of defendant, he is deemed to have entered his appearance to the next term of court.[139]

PROCESS UPON INFANTS

Mississippi statutory service of process upon infants is as follows:[140]

> "If the defendant be an unmarried infant the process shall be served upon him personally, and upon his father, mother, or guardian, if he have any in this state, but if he be married, process may be served as on an adult. If an unmarried infant be joined as co-defendant with his father or mother or guardian, it shall not be sufficient to summon such infant and his father or such infant and his mother, or such infant and his guardian, in one process, but one copy of the process shall be served on the infant personally and a copy served personally on such father or mother or guardian."

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[128] Miss. Code Ann. § 1475.5 (1942).

[129] Christopher v. Brown, 211 Miss. 322, 51 So.2d 579 (1951); Sherman v. Stewart Co., 216 Miss. 549, 62 So.2d 876 (1953).

[130] Reichman Crosby Co. v. Horton, 143 Miss. 141, 108 So. 443 (1926).

[131] Brotherhood of Railroad Trainmen v. Agnew, 170 Miss. 604, 155 So. 204 (1934); Home Insurance Co. v. Watts, 91 So.2d 722 (Miss. 1957).

[132] Sanders v. Dowell, 7 Sm. & M. 206 (Miss. 1846).

[133] Planters Bank v. Walker, 3 Sm. & M. 409 (Miss. 1844); Duncan v. Gerandine, 59 Miss. 550 (1882).

[134] Miss. Code Ann. § 1873 (1942); 42 Am. Jur., Process § 131; See note 133 supra.

[135] Lumpkin v. Russell, 108 Miss. 742, 67 So. 185 (1915).

[136] Miss. Code Ann. § 1862 (1942).

[137] Miss. Code Ann. § 1873 (1942).

[138] Bustamente v. Bescher, 43 Miss. 172 (1870); Hathcock v. Owens, 44 Miss. 799 (1871).

[139] Miss. Code Ann. § 1881 (1942).

[140] Miss. Code Ann. § 1863 (1942); 27 Am. Jur., Infants § 139.

No jurisdiction can be obtained of an infant unless it is shown affirmatively that the statute has been complied with, or that the infant has no father, mother, or guardian within this state. It would appear that this fact might be shown by proof as well as by the officer's return.[141] Where mother and child co-defendants are summoned in one process (the mother's relationship appearing upon the face of the summons), a return showing a delivery of a copy to each is sufficient.[142] The record must affirmatively show every essential under the statute in order to show proper service of process upon an infant.[143] An appearance by an attorney for an infant is insufficient because he cannot waive process for the infant.[144] Any judgment against an infant which does not comply affirmatively with the process statute is void,[145] and a judgment against an adult will not aid a void judgment taken against a minor.[146] The appearance of the minor, himself, in court will not bind him if he has not been served according to law, and the court is without jurisdiction to proceed against him.[147] When the minor has been properly served in compliance with the statute, the court has jurisdiction and may proceed as in any other case, and this is true although the court does not appoint a guardian ad litem.[148] Section 1309, Code of 1942, provides, "A decree or judgment of any court shall not be void or erroneous because of the failure to have a guardian ad litem . . . ," but it has often been held by other courts that a judgment by default cannot be taken against an infant.[149] It seems that it is necessary to make proof on trial rather than take judgment by default in Mississippi.[150]

SERVICE OF PROCESS ON THE STATE, COUNTY, AND CITY GOVERNMENT

The State, its subdivisions, and agencies, are not subject to a suit in the courts of this state[151] except when expressly authorized and such authority cannot be implied;[152] therefore, the power to sue is measured by statute authorizing suit.[153] Where the Legislature has authorized suits against the state,[154] summons may be served on the Attorney General in the same manner other process is served, but no judgment by default may be taken against the state.[155]

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[141] Stanton v. Pollard, 24 Miss. 154 (1852); Erwin v. Carson, 54 Miss. 282 (1876); Moody v. McDuff, 58 Miss. 751 (1881); Gibson v. Currier, 83 Miss. 234, 35 So. 315 (1903); Prudential Insurance Co. v. Gleason, 185 Miss. 343, 187 So. 229 (1939).

[142] McIlvoy v. Alsop, 45 Miss. 365 (1871); (the wisdom of this case is doubted); Culley v. Rhodes, 124 Miss. 640, 87 So. 136 (1921); Baldwin v. Thompson, 132 Miss. 125, 95 So. 835 (1935).

[143] Ingerson v. Ingerson, 42 Miss. 155 (1868); Mullins v. Sparks, 43 Miss. 129 (1870); Moody v. McDuff, 58 Miss. 751 (1881); Erwin v. Carson, 54 Miss. 282 (1876); Gibson v. Currier, 83 Miss. 234, 35 So. 315 (1903).

[144] Parker v. Smith, 150 Miss. 849, 117 So. 249 (1948).

[145] Gibson v. Currier, supra note 143.

[146] Wirtz v. Gordon, 187 Miss. 866, 184 So. 798 (1938).

[147] Carter v. Graves, 93 So.2d 177 (Miss. 1957).

[148] Culley v. Rhodes, 124 Miss. 640, 87 So. 136 (1921); Hutton v. Hutton, 102 So.2d 424 (Miss. 1958).

[149] 27 Am. Jur., Courts § 129.

[150] McIlvoy v. Alsop, 45 Miss. 365 (1871); Edmunds v. Mister, 58 Miss. 765 (1881).

[151] See Southern Digest, States, Key number 191 for cases on this point.

[152] State v. Woodruff, 170 Miss. 744, 150 So. 760 (1933).

The Legislature has authorized suits against counties[156] and municipalities,[157] and the process against a county may be served upon the president or clerk of the Board of Supervisors in a case against a county, and the mayor or municipal clerk in a case against a municipality.[158]

It should be noted here that as late as 1932 the Legislature permitted writs of garnishment to be served upon the State, county, municipality, and other political subdivisions of the state.[159]

PROCESS ON PERSONS OF UNSOUND MIND

Our statute authorizing process on persons of unsound mind is as follows:

> "If the defendant be a person judicially declared of unsound mind, service of process shall be on him, and upon his guardian, if he have any, but if such defendant be an inmate of an insane hospital, and the superintendent shall certify that he is mentally incapable of responding to process, service of process on such person shall not be required and the certificate of the superintendent shall be indorsed on or attached to the process for such defendant and shall be in lieu of service thereof."[160]

It is important to remember that the service upon the guardian and the lunatic must be made separately,[161] and this may be done at different times. [162] It has been stated in the text-books that process upon persons of unsound mind who have not been declared lunatics by judicial proceedings, and who are not in institutions, and who do not have guardians, may be served in the same manner as other persons.[163] It is the general practice in the United States where the defendant is shown to be insane to require a guardian if the defendant is an infant, and to appoint an attorney to represent him if he is an adult.[164] One of the recent cases in Mississippi has approved indirectly the theory that an insane person should be represented[165] by declaring, "The fact that Dana was represented throughout the litigation in a manner calculated to conserve and protect his rights is of more importance than the characterization of such representative." It appears that a suit by a guardian ad litem, or next friend, will bind a lunatic.[166] A non compos mentis can bring suit through his next friend.[167] The voluntary appearance of a guardian ad litem without process has been questioned by the text-books,[168] as has the appearance of a natural or legal guardian.[169] Our Court has held that the voluntary appearance of an unmarried minor confers no jurisdicton on the court,[170] and the Court would likely hold that the voluntary appearance of a known lunatic would confer no jurisdiction on such person until someone was appointed to represent him and such person had been properly brought into court—because if plaintiff knew of defendant's insanity and failed to inform the court, it may be considered a fraud upon the process of the court. The text-books seem to hold that a judgment taken without representation against a person of unsound mind is not void, but voidable, and not subject to collateral attack; nevertheless, Mississippi is a common law state and the ancient writ of *coram nobis* has been used to vacate a judgment against a known lunatic.[171] A judgment against an idiot by default is a nullity.[172]

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[153] State Highway Commission v. Gully, 167 Miss. 631, 145 So. 351 (1933).
[154] Miss. Code Ann. § 4387 (1942).
[155] Miss. Code Ann. § 4388 (1942).
[156] Miss. Code Ann. § 2955 (1942).
[157] Miss. Code Ann. §§ 3374 (2), 3374-112 (1942).
[158] Miss. Code Ann. § 1865 (1942).
[159] Miss. Code Ann. § 2883 (1942).
[160] Miss. Code Ann. § 1864 (1942).
[161] Potts v. Hines, 57 Miss. 735 (1880).
[162] Owens v. Sumrall, 204 Miss. 15, 36 So.2d 800 (1948).
[163] 28 Am. Jur., Insane and Other Incompetent Persons § 112 (1957).
[164] 28 Am. Jur., Insane and Other Incompetent Persona § 109 (1957).
[165] Dana v. Zerowsky, 192 Miss. 302, 5 So.2d 423 (1942).

PROCESS ON PRISONERS, PARTNERS, AND EXECUTORS

Prisoners. Process may be made upon a prisoner "if the defendant be imprisoned by the sentence or judgement of any court, either in a county, city, town, or village jail, or in the state penitentiary, the officer to whom the process is addressed may serve it himself, or service by the jailer or keeper of the penitentiary shall be sufficient."[173]

Partners. In actions against partners, some of whom are non-residents of this state, or cannot be found, service of process on such partners as may be found in this state shall be sufficient to maintain the suit against all the partners so as to bind the assets of the partnership and of the individual summoned.[174]

A judgment against all of the partners when only one has been summoned is erroneous, unless the officer's return shows or it is shown elsewhere in the record that those not summoned were non-residents and could not be found.[175] A suit may be brought against one partner without taking judgment against the other partner on a note since the obligation is joint and several, and judgment against one would not affect plaintiff's rights against others unless satisfaction is obtained.[176] Process must be served on each partner in order for the judgment to be binding on each.[177]

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[166] Gillespie v. Hauenstein, 72 Miss. 836, 17 So. 602 (1895); Dana v. Zerowsky, ibid.

[167] Columbia Mutual Life Ins. Co. v. Jones, 160 Miss. 41, 133 So. 149 (1931); Gillespie v. Hauenstein, supra note 166.

[168] See note 163 supra.

[169] 25 Am. Jur., Guardian and Ward § 97.

[170] Carter v. Graves, 93 So.2d 177 (Miss. 1957).

[171] 28 Am. Jur. Insane and Other Incompetent Persons § 116 (1957); 34 ALR 221 (1925); 140 ALR 1336 (1942).

[172] 28 Am. Jur., Insane and Other Incompetent Persons § 116 (1957).

[173] Miss. Code Ann. § 1867 (1942).

[174] Miss. Code Ann. § 1869 (1942).

Executors and Administrators. If there are two or more executors or administrators of an estate and process cannot be served upon all of them, service on one will be sufficient to authorize a judgment against all of them.[178]

SERVICE OF PROCESS ON CORPORATIONS

Service of process upon a corporation may be executed by delivering a copy to one of the following:[179]

> President or head of the corporation, the cashier, secretary, treasurer, clerk, or agent of the corporation, or upon one of the directors of the corporation.
>
> If the corporation is a sleeping-car company, service may be made upon the conductor.
>
> If a steamboat company, process may be served upon the captain or other officer of a boat thereof.
>
> In suits against railroad, sleeping-car, telegraph, telephone, express, steamboat, and insurance companies or corporations, or in suits against a receiver or receivers in charge of the property of any such company or corporations, the process may be served on any agent of the defendant, or sent to any county in which the office or principal place of business may be located, and there served as herein directed and authorized; or served on any one of the foregoing officers of such corporation or company and upon the secretary, cashier, treasurer, clerk, depot agent, attorney or any other officer or agent of such receiver or receivers, or upon any of them in person.

When any writ of process against such corporation, company, receiver, or receivers has been returned executed, the defendant or defendants shall be considered in court, and the action shall proceed as actions against natural persons. All process and notices to be served upon such companies, corporations or receivers may be served as directed.[180] The principal place of business is synonymous with domicile.[181] A delivery of a copy of process to a clerk to be delivered to the president of the company is not sufficient.[182] Foreign corporations becoming domesticated are required to designate an agent for the purpose of process, and on failure to do so, the Secretary of State is the agent for the purpose of process.[183]

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[175] Tabler v. Bryant, 62 Miss. 350 (1884).
[176] Enochs & Flowers v. Bank of Forrest, 172 Miss. 36, 159 So. 407 (1935).
[177] See note 176 supra.
[178] Miss. Code Ann. § 1868 (1942).
[179] Miss. Code Ann. § 1866 (1942).
[180] See note 179 supra.

PROCESS UPON FOREIGN CORPORATIONS, FIRMS AND PERSONS

Foreign Corporations. Foreign corporations doing business in Mississippi are subject to suit here,[184] and process may be served upon any agent of the corporation found within the county where the suit is brought regardless of the legal character of the agent. Where there is no agent in the county, process may be served upon any person who represented the corporation at the time of the transaction out of which the suit arose. The officer serving the process shall state in his return all of the facts concerning the person upon whom the process was issued. The clerk of the court will also immediately mail a copy of the process to the home office of the corporation by registered letter, and file his certificate showing such mailing, and make a minute thereof on the docket. No judgment may be taken against the defendant until thirty days from the date of the mailing of the process.[185] A failure to comply with the essential steps required by this section[186] will not support a judgment, and such a judgment is void.[187] This section does not apply to insurance companies, nor can process be served in a county where the law requires the suit to be filed in another county.[188] This section of the Code[189] applies only to foreign corporations found doing business in Mississippi.[190] Where process is sought on a resident agent appointed under another section of the Code,[191] proof must be made in the record that such agent is a resident agent.[192] The Court has held that a mere soliciting agent is not such an agent upon whom process may be served,[193] nor is a traveling salesman of a company not "doing business in Mississippi" such an agent as is contemplated by the statute.[194] Process upon a plantation manager of a non-resident corporation is sufficient although the defendant corporation had designated another as a resident agent insofar as the tolling of statute of limitations is concerned.[195] It has been held that the service of process is void if it does not designate the relation of the person on whom process is served,[196] but where the process shows service upon "E. M., agent of and for," it is sufficient.[197] Issuing summons to a past due return date[198] or taking judgment where the record does not reveal that the clerk mailed a copy of the process as required by Section 5346, Code of 1942, is void.[199]

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[181] Plummer-Lewis Co. v. Fancher, 111 Miss. 656, 71 So. 907 (1916).

[182] Hyde Construction Co. v. Elton Murphy-Walter Travis Corporation, 227 Miss. 615, 86 So.2d 455 (1956).

[183] Miss. Code Ann. §§ 5319, 5343 (1942).

[184] Miss. Code Ann. § 5345 (1942).

[185] Miss. Code Ann. § 5346 (1942).

[186] See note 184 supra.

[187] Cudahy Packing Co. v. Smith, 191 Miss. 31, 2 So.2d 347 (1941).

[188] Fireman's Fund Ins. Co. v. Cole, 169 Miss. 634, 152 So. 872 (1934).

[189] See note 184 supra.

[190] Knower v. Baldwin, 195 Miss. 166, 15 So.2d 47 (1943).

[191] Miss. Code Ann. § 5319 (1942).

[192] Superior Oil Co. v. Smith, 200 Miss. 782, 29 So.2d 114 (1947).

[193] Saxony Mills v. Wagner, 94 Miss. 233, 47 So. 899 (1909).

[194] Knower v. Baldwin, supra note 190.

SECRETARY OF STATE—AGENT FOR PROCESS

Every foreign corporation, doing business in this state, whether domesticated, or simply authorized to do business within the state, shall file a written power of attorney designating the Secretary of State, or, in lieu thereof, an agent upon whom process may be served. By failing to do so, the foreign corporation shall not be permitted to bring or maintain any action or suit in any of the courts of this state,[200] and when the resident agent is also a corporation, process may be served on the officers named in the Code.[201]

In actions for damages against non-resident persons, corporations, firms, or partnerships, limited or general, who shall do business or perform any character of work or service in this state, such non-residents shall be deemed to have appointed the Secretary of State as their agent for the purpose of process.[202] This section (Section 1519, Code of 1942) applies to torts as well as contracts,[203] but not to corporations qualified under Mississippi law to do business in Mississippi.[204]

Automobiles, non-resident. Non-resident persons (or their agents) using the highways of Mississippi are deemed to have appointed the Secretary of State to be their true and lawful attorney for the purpsoe of process in any action growing out of a collision or accident which occurred while the non-resident or his agent was operating a motor vehicle upon the streets, highways, or else-where within the state.[205]

Investment Corporations. Security dealers or investments companies are required to file with the Secretary of State written appointment of an agent for the purpose of process, and this appointment shall be irrevocable.[206]

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[195] Fredrick Smith Enterprise Co. v. Lucas, 104 Miss. 43, 36 So.2d 812 (1948).
[196] Supreme Ruling F.M.C. v. Sommers, 108 Miss. 54, 66 So. 322 (1914).
[197] National Surety Co. v. Holmes Co., 120 Miss. 706, 83 So. 8 (1919).
[198] Columbia Star Mills v. Wagner, 115 Miss. 625, 76 So. 557 (1917).
[199] Eminent Household v. Lundy, 110 Miss. 881, 71 So. 16 (1916).
[200] Miss. Code Ann. § 5319 (1942).
[201] Ibid.
[202] Miss. Code Ann. § 1437 (1942).
[203] Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So.2d 615 (1951).
[204] Miss. Code Ann. § 1470 (1942).
[205] Miss Code Ann. § 9352-61 (1942) as amended by Miss. Laws c. 262 (1958).
[206] Miss. Laws c. 202 (1958).

How Process Served Upon the Secretary of State

Service of process upon the Secretary of State shall be made by the sheriff of Hinds County, and his fee shall be paid in advance. The sheriff shall serve two copies of the process upon the Secretary of State. Under Section 1438, Code of 1942, the summons must bear the address of the defendant. The clerk of the court in which the proceeding is filed shall immediately, upon the filing of the declaration, send by registered mail, postage prepaid, a true copy of the process to the non-resident defendant. The clerk is required to file an affidavit and the registry receipt with the court as a record to show the mailing of the copy to the defendant.[207]

It should be noted here that process upon the Secretary of State as an agent for a non-resident (Section 1492, Code of 1942) and process upon an agent for a foreign corporation (Section 5346, Code of 1942) are not alike. Section 5346 requires the clerk of the court to file a certificate showing that a copy of the process was mailed, and a note must be made by the clerk upon the docket showing his actions. On the other hand, Section 1492 requires an affidavit together with the registry receipt. The process against the Secretary of State (Sec. 1438) shall have the same force and effect as if such non-resident had been duly served within the state. Again, under Section 5346 no judgment can be taken until 30 days from the date of the mailing of the process.

It should also be noted that in suits under the non-resident motorist statute the Secretary of State must be paid three dollars for each defendant, and two copies of the process must be delivered for each of the defendants with the address of the defendants written on the process.[208] In addition thereto, notice or delivery by certified or registered mail, or an affidavit showing actual delivery of process to the defendant, or a return receipt showing a refusal to accept the delivery of the process, shall be filed with the court where the action pending before judgment can be taken.

Process Upon Domesticated Foreign Corporations

When a foreign corporation becomes domesticated under the laws of the State of Mississippi,[209] process may be served upon the Secretary of State, or any agent of such corporation in this state, and such service of process shall be as effectual as if it had been served upon the officers of a domestic corporation.[210] However, when foreign corporations appoint a resident agent, they are exempt from service of process upon the Secretary of State.[211]

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[207] Miss. Code Ann. § 1438 (1942).
[208] Miss. Code Ann. § 9352 (1942). Amended by Miss. Laws c. 262 (1958).
[209] Miss. Code Ann. §§ 5339, 5340, 5341 (1942).
[210] Miss. Code Ann. §§ 5319, 5342 (1942).
[211] Miss. Code Ann. § 1440 (1942).

PROCESS UPON FOREIGN PERSONS, FIRMS AND PARTNERSHIPS

Process may be served upon all persons, firms, corporations, or copartnerships carrying on business in the State of Mississippi by or through trustees, or attorneys in fact, by serving process upon such trustees, or attorneys in fact, or agents in the same manner as is provided for service of process upon foreign corporations.[212]

PROCESS UPON INSURANCE COMPANIES

Process upon Mississippi insurance companies may be served as process upon other corporations,[213] and suits may be brought in any county where a loss may occur; or if on a life insurance policy, in the county where the beneficiary resides or at the principal place of business of such corporation, and if a foreign company, in any county where process may be served upon an agent of the company.[214] All foreign insurance companies doing business in Mississippi are required to file an instrument appointing the Commissioner of Insurance as attorney upon whom all process in any action may be served. The service of process upon the Commissioner of Insurance shall be made by leaving a copy of the process in the office or hands of the Commissioner of Insurance, and copies of such instrument shall be deemed sufficient evidence thereof. Service of process upon the Commissioner of Insurance shall be deemed service upon the company.[215] This section of our Code also provides that the insurance company shall appoint an agent, in writing, signed by the president and secretary or manager or general agent, to acknowledge service of process for and on behalf of the insurance company—thus consenting to the service of process on the agent and such service will be as valid as if served upon the company. It will be noted that this section of the Code requires that the insurance company waive all claims of error by reason of service on the agent.[216] The Commissioner of Insurance is required to notify the company or its agent, but the failure to do so does not affect the validity of the service of process upon the Insurance Commissioner.[217]

PROCESS UPON FRATERNAL BENEFIT SOCIETIES

Every fraternal benefit society, whether domestic or foreign, shall appoint the "Superintendent of Insurance" to be its lawful attorney on whom all legal process shall be served and must agree that such service shall be of the same legal force as if served upon the society. Service shall only be made upon such attorney and shall be in duplicate. In his absence, the person in charge of the office shall be served with the process; provided, however, that no service shall be binding or valid when it requires an answer or pleading within thirty days from the date of mailing the copy of service to such society.[218]

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[212] Miss. Code Ann. § 1860 (1942).
[213] Miss. Code Ann. § 1866 (1942).
[214] Miss. Code Ann. § 1435 (1942).
[215] Miss. Code Ann. § 5672 (1942).
[216] Miss. Code Ann. § 5672 (4) (1942).
[217] Miss. Code Ann. § 5635 (1942).

PROCESS UPON BURIAL ASSOCIATIONS

Domestic burial associations may be summoned by process as other domestic corporations.[219] Service of process upon foreign burial associations may be made by serving process upon the Insurance Commissioner.[220] The similarity of the service of process upon the Insurance Commissioner for foreign burial associations[221] and process upon the Insurance Commissioner for fraternal benefit societies[222] will be observed with the following exceptions:

Process upon fraternal societies[223] requires that process be served only on the Insurance Commissioner and that process must be served in duplicate; moreover, no answer or pleadings can be required in less than thirty days. On the other hand, process upon foreign burial associations only requires that one copy be left with the Insurance Commissioner or in his office.[224] It is also of interest to observe that the State Commissioner of Insurance[225] is designated by our statute as "Superintendent of Insurance" for process on fraternal societies.[226]

PROCESS UPON CARNIVAL, CIRCUS, AND FAIR

In addition to the service of process against non-residents in any county where the defendant may be found,[227] and process in attachment proceedings for debt,[228] (which do not lie in actions based on actions ex-delicto)[229] we now have, since 1952, a new law whereby process may be served upon any carnival, circus, fair or any other concern or organization not permanently domiciled in this state by serving a copy of the process and a copy of the petition upon the Secretary of State together with a fee of two dollars and fifty cents ($2.50). The last known address of the defendant must be given to the Secretary of State, who will immediately mail to the defendant a notification of said service of process by restricted registered mail.[230] It is expressly provided that this form of process adopted by the Legislature does not prevent personal service of process upon defendants found in Mississippi or in the county where the actions accrue.[231]

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[218] Miss. Code Ann. § 5760 (1942).
[219] Miss. Code Ann. § 1866 (1942).
[220] Miss. Code Ann. § 5595 (1942).
[221] Ibid.
[222] Miss. Code Ann. §§ 5617, 5760 (1942).
[223] Ibid.
[224] See note 222 supra.
[225] Miss. Code Ann. § 5816 (1942).
[226] See note 222 supra.
[227] Miss. Code Ann. §§ 1437, 1438, 1440, 5346 (1942).
[228] Miss. Code Ann. §§ 2675, 2686, 2687 (1942).
[229] Fellows v. Brown, 38 Miss. 541 (1860).
[230] Miss. Code Ann. §§ 1866-1-2 (1942).

This section[232] was amended in 1958 so as to permit the service of process in the same manner and with the same force and effect as is provided for service of process on non-resident motorist defendants under Section 9352-61, Code of 1942, as amended by the Mississippi General Laws c. 262 (1948). This amendment will likely cause confusion since it did not repeal the method established by Section 1866-02, Code of 1942, and while the two statutes are similar, they are not identical in every respect.[233]

PROCESS UPON THE DEFENDANT BY PUBLICATION

It is well known, of course, that the process of one state cannot run into another so as to give personal jurisdiction over the defendant,[234] but the law does permit process by publication in respect to proceedings in rem or quasi in rem. The law may, in proper cases, authorize the rendition of a judgment in personam on the basis of such constructive notice, but not as to non-residents, since the only judgment that may legally be predicated on service by publication is a judgment affecting the property brought under the control of the court[235] or one by virtue of the police powers of the state.[236] Personal service of process is the primary method of obtaining jurisdiction over the person of the defendant, and unless there is a statute authorizing another or substituted form of process, service of process must be personal.[237]

There are some instances in Mississippi where publication of notice to the defendant non-resident is permitted. They are: attachments,[238] scire facias process,[239] garnishment,[240] seizure of contraband,[241] and replevin.[242] Publication in all cases and in every court when authorized by law shall be made as prescribed for non-residents or absent defendants in chancery, unless otherwise provided.[243] It should be noted here that we have a statute which permits the service of process in another state or country. This statute provides for a method of acknowledgement of process, or an affidavit showing process was served, and may be used in lieu of the service of process by publication,[244] but this does not authorize a personal judgment against the defendant.[245]

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[231] Miss. Code Ann. §§ 1866, 1866-5, 1866-6 (1942).
[232] Ibid.
[233] Miss. Code Ann. § 1866-2 (1942), compare Miss. Laws c. 262 (1958).
[234] Cudabac v. Strong, 67 Miss. 704, 7 So. 543 (1890).
[235] 42 Am. Jur., Process §§ 47, 58, 77 (1957).
[236] Daves v. Nugent, 90 F. Supp. 522 (S. D. Miss. 1950).
[237] 42 Am. Jur., Process §§ 53, 64 (1957).
[238] Miss. Code Ann. § 2693 (1942).
[239] Miss. Code Ann. § 1870 (1942).
[240] Miss. Code Ann. §§ 2787, 2799, 2804 (1942).
[241] Miss. Code Ann. § 2618 (1942).
[242] Miss. Code Ann. § 2858 (1942).
[243] Miss. Code Ann. §§ 1852, 1856 (1942).

PROCESS ON APPEAL TO THE CIRCUIT COURT AND TO THE SUPREME COURT

Where an appeal is taken to the circuit court, the parties properly before the lower court or commission[246] are before the circuit court on appeal.[247] Where the defendant gives the required bond and the papers are properly sent up, no notice of appeal is necessary since the case is not a new action requiring "due process of law,"[248] and the case stands ready for trial de novo.[249] The circiut court has jurisdiction of the defendant although the defendant was not properly summoned in the lower court if he entered his appearance and makes a motion to quash the process.[250] The defendant may elect in such a case to either appeal or bring it to the circuit court's attention by certiorari.[251] It will be remembered that civil cases are returnable to and triable at the first term of the circuit court after an appeal.[252]

It will also be remembered that process is necessary on an appeal to the Supreme Court, and an appellee must have notice of the appeal.[253]

WAIVER OF PROCESS

There are several ways by which the law permits the taking of a judgment against a defendant although he has not been properly served with process. They are: office confession; confession or admission of a part; demand by defendant in which case a judgment nil dicit for that part admitted to be due may be taken;[254] waiver of process in writing which has been properly filed;[255] appearance of defendant, and defending an action without raising the question of process;[256] appearing and fixing motion to quash process;[257] judgment may be taken when defendant appeals a case and causes it to be reversed for process.[258]

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[244] Miss. Code Ann. § 1854 (1942).

[245] Cudabac v. Strong, supra note 234.

[246] Miss. Code Ann. §§ 1195, 1197, 6698-26 (1942).

[247] Miss. Code Ann. § 1198 (1942).

[248] Rowe v. Cannon, 84 Miss. 101, 36 So. 146 (1904).

[249] Cory v. Buddenroff, 98 Miss. 98, 54 So. 84 (1911).

[250] Illinois Central Ry. Co. v. Swanson, 92 Miss. 485, 46 So. 83 (1908).

[251] Turner v. Williams, 162 Miss. 258, 139 So. 606 (1932).

[252] Miss. Code Ann. § 1201 (1942).

[253] Beasley v. Cottrell, 94 Miss. 253, 47 So. 662 (1908); Miss. Code Ann. §§ 1898, 1958 (1942).

[254] Williams v. Harris, 2 How. 627 (Miss. 1837); Miss. Code Ann. §§ 1551, 1552 (1942).

[255] Townsend v. Beavers, 185 Miss. 321, 188 So. 1 (1939); Cullens v. Cullens, 187 Miss. 731, 193 So. 805 (1940); Miss. Code Ann. § 1881 (1942).

[256] Turner v. Williams, note 251 supra.

[257] Bustamente v. Bescherm, 43 Miss. 172 (1870); Hathcock v. Owens, 44 Miss. 799 (1871); Miss. Code Ann. § 1881 (1942).

The law considers it a waiver to refuse process of the court when it is offered to him.[259] If an officer is prevented by force from serving the process, the plaintiff may have new process issued, or he may proceed as if the process had been duly served.[260]

A written waiver of process must be filed after the date of the filing of the declaration, and it must be under oath or acknowledgment.[261] A waiver of process does not apply to a minor, since neither he, nor his attorney, can waive his rights.[262]

WHEN TRIABLE

When the process has been served more than five days before the term of court to which it is returnable, the defendant is required to plead at that term of court,[263] but the defendant has the entire first day of the term in which to file his pleadings.[264]

If the process has been served more than thirty days before the return term, the defendant is required to plead within the thirty days unless the judge has granted more time in which to file pleadings under our pleading statute, and it is stated, "And for want of plea, judgment may be entered by default."[265] However, grave doubt has arisen in the minds of some lawyers as to whether or not the defendant is debarred from pleading on the first day although he has not filed a plea within the thirty days allowed by the foregoing Code section. The reason lawyers are concerned is because the process ordinarily commands the officer to summon defendant to "be and appear before the court on the first day of the term" in accordance with the process statute which expressly states, "it shall be returnable on the first day of the term,"[266] and the process usually directs the defendant, "to then and there plead, answer or demur." Our Mississippi Constitution guarantees, "no person shall be debarred from prosecuting or defending any civil cause . . . before any tribunal in the State . . . ,"[267] and requires, "all courts shall be open; and every person . . . shall have remedy by due course of law,"[268] meaning, "no one shall be personally bound until he has had his day in court."[269]

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[258] Miss. Code Ann. § 1882 (1942).

[259] Story v. Ware, 35 Miss. 399 (1858).

[260] Miss. Code Ann. § 1874 (1942).

[261] Miss. Code Ann. § 1872 (1942).

[262] Winston v. McLendon, 43 Miss. 254 (1870); Parker v. Smith, 150 Miss. 849, 117 So. 249 (1928); 27 Am. Jur., Infants §§ 129, 140.

[263] Miss. Code Ann. § 1519 (1942).

[264] Schilling v. USF&G Co., 169 Miss. 275, 152 So. 887 (1934); Miss. Code Ann. § 1519 (1942).

[265] See note 263 supra.

[266] Miss. Code Ann. § 1848 (1942).

[267] Miss. Const. § 25 (1890).

[268] Miss. Const. § 24 (1890).

[269] Galpin v. Page, 85 U.S. 350 (1874); 12 Am. Jur., Constitutional Law § 269.

It is, therefore, a serious question as to whether or not the court could prevent the defendant from pleading on the first day of the return term of court, the very day he is notified to plead, because notice of time and place and right to be heard is so essential to "due process" that taking a default on "his day in court" might be considered legal entrapment.[270] The Bar Association is now recommending that this Section of the Code be amended so as to fix a time in vacation in which to plead and so as to establish a form of process that gives notice of the time therein.

When the pleading has been properly filed, any dilatory plea included therein may be heard at the return term although only five days notice has been given, but issues of fact cannot be tried until the next term of court unless there has been the full thirty days service of process.[271]

A case is not triable as to one defendant until it is ready for trial as to all defendants,[272] and service on several defendants will not validate a judgment by default against one not properly served for the time and in the manner required by law.[273] This does not mean a default judgment cannot be taken against one properly summoned; nor that plaintiff cannot elect to sue one of several defendants who are jointly liable.[274]

The clerk of the circuit court is required to make out a docket on which he shall set the cases triable at the approaching term, commencing with the first day and proceeding into the term so far as the number of suits may require, and a case shall not be taken up before the day on which it is set except by consent.[275] A judgment cannot be taken by default against plaintiff on the first day of the term of court unless the case was set for trial on that date.[276] Where the summons requires the defendant to plead on the first day, it is error to refuse to permit defendant to plead after his motion to quash the process has been overruled.[277] When the judge states a case will not be reached until a certain day, judgment by default before that time must be set aside.[278]

JUDGE'S DUTY ON MOTION FOR DEFAULT JUDGMENT

When the case has been called and the defendant does not appear and plaintiff makes his motion for default judgment, it becomes the duty of the judge to physically examine the process and returns and determine whether or not the defendant has been given legal notice.[279] The docket should be examined to determine whether or not there is a plea on file since default judgment cannot be taken until all pleas have been settled.[280] It must appear affirmatively of record that the defendant has been properly brought within the jurisdiction of the court.[281] The judge should also determine whether or not the declaration states a cause of action since a judgment cannot be based on pleadings that do not state a cause of action;[282] nor can it be assumed that anything is proved beyond what is shown on the face of the pleadings.[283] It has been held that a judgment on pleadings that do not state a cause of action is void.[284]

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[270] McAdory v. Turner, 56 Miss. 666 (1879); 12 Am. Jur., Constitutional Law § 595.

[271] Miss. Central Ry. Co. v. Aultman, 173 Miss. 622, 160 So. 737 (1935).

[272] Kelly v. Brooks, 57 Miss. 225 (1879); Khoury v. Saik, 203 Miss. 155, 33 So.2d 616 (1948); Robbins v. Berry, 209 Miss. 422, 47 So.2d 846 (1950).

[273] Day Lumber Co. v. Citizens Bank, 94 Miss. 212, 48 So. 727 (1909).

[274] Wren v. Pierce, 4 Sm. & M. 91 (Miss. 1845); Cox. v. Weed Sewing Machine Co., 57 Miss. 350, (1879); McCannon Co. v. Richardson, 117 Miss. 345, 78 So. 292 (1918); Miss. Code Ann. §§ 334, 335.5 (1942).

[275] Ball v. Sinking Fund, 3 Sm. & M. 127 (Miss. 1844); Miss. Code Ann. § 1418 (1942).

[276] International Shoe Co., v. Garfinkle, 146 Miss. 799, 112 So. 168 (1927).

[277] Story v. Mayes, 35 Miss. 399 (1858); Miss. Code Ann. § 1848 (1942).

[278] Gardner v. Price, 199 Miss. 809, 25 So.2d 459 (1946).

A judgment can be taken nihil dicit (he says nothing) when defendant does not deny a part due unless the defendant tenders the amount admitted,[285] and this common law rule has been, in effect, incorporated in our statutory law upon open accounts in which a verified account is required to be denied under oath, "particularizing wherein it is not correct."[286] However, our Court has held the defendant can submit his whole case for trial because the statute is not one of pleading and practice but one of evidence; therefore, a judgment by default will not be taken without offering proof.[287] The judge should bear in mind that although a judgment should not be taken while there is a plea on file, nevertheless, the court cannot set aside a judgment entered at a former term of court.[288] The judgment should show there are no pleas on file at the time of the judgment.[289]

On motion for default judgment, the court should also examine the exhibits attached to the declaration to determine whether or not there are other exhibits that should be attached. The above is true because our Mississippi Law[290] states that unless the necessary writing is annexed to the declaration, or filed therewith, the declaration may not state a cause of action;[291] and although the court has often held that this must be raised in the trial court,[292] it has also held that where the declaration does not state a cause of action and the question is raised, the writing must be annexed.[293] It will not support a default judgment.[294]

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[279] Brotherhood of Railroad Trainmen v. Agnew, 170 Miss. 604, 155 So. 205 (1934).

[280] Hambrick v. Dent, 70 Miss. 59, 11 So. 608 (1892); Dalton v. Rhodes Motor Co., 153 Miss. 51, 120 So. 821 (1929); Randall v. Gunter, 181 Miss. 332, 179 So. 362 (1938).

[281] Winston v. Miller, 12 Sm. & M. 550 (Miss. 1849).

[282] Beck v. Rosser, 68 Miss. 72, 8 So. 259 (1890); Penn Mutual Life Ins. Co. v. Keeton, 95 Miss. 708, 49 So. 736 (1909); Odom v. Gulf S. I. R. Co., 101 Miss. 642, 57 So. 626 (1912); Carrier Lumber Co. v. Quitman County, 156 Miss. 396, 124 So. 437 (1929); Smith v. Dees, 158 Miss. 11, 130 So. 105 (1930); Stevens v. Barbour, 193 Miss. 109, 8 So.2d 242 (1942); Mutual Health & Accident Co. v. Crowder, 201 Miss. 92, 28 So.2d 654 (1947).

[283] Bradstreet Co. v. City of Jackson, 81 Miss. 233, 32 So. 999 (1902); Penn. Mutual Life Ins. Co. v. Keeton, supra note 282.

[284] Steel v. Palmer, 41 Miss. 88 (1866).

[285] Williams v. Harris, 2 How. 627 (Miss. 1837).

[286] Miss. Code Ann. § 1754 (1942).

[287] Parker v. Thornton, 206 Miss. 662, 40 So.2d 538 (1949).

[288] Dalton v. Rhodes Motor Co., 152 Miss. 51, 120 So. 821 (1929).

[289] Irving v. Montgomery, 3 How. 191 (Miss. 1839).

[290] Miss. Code Ann. § 1469 (1942).

PROCESS, PRIVILEGES AND EXEMPTIONS

In conclusion, it is perhaps useful to call to the attention of the members of the Bar that there are certain persons, under certain conditions, who are exempt from service of civil process. It is generally known and accepted that ambassadors and public ministers, serving in foreign countries, are not subject to the laws of the country in which they serve.[295] It is also true that other persons are exempt from service of process because of public policy and among these are: congressmen and members of the legislature,[296] judges,[297] persons attending court as litigants and witnesses,[298] lawyers,[299] and non-resident officers of corporations.[300] There seems to be a difference of opinion of the courts as to whether or not persons who are residents of the state and served with process while at court in another county are exempt from service of process.[301] In Mississippi, we have a statute that provides for the transfer of such causes to the home county of the defendant.[302] The exemption may be waived since it is a personal privilege, and is waived unless claimed at the proper time.[303]

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[291] Nivitt v. Rabe, 5 How. 653 (Miss. 1841); Tierney v. Duffy, 59 Miss. 364 (1882); State v. Cameron, 223 Miss. 50, 77 So.2d 716 (1955).

[292] Enochs-Flowers v. Bank of Forrest, 172 Miss. 36, 157 So. 711 (1934). Alexander v. Carsley, 199 Miss. 781, 25 So.2d 709 (1946); Britton v. Magnolia State Casket Co., 210 Miss. 264, 49 So.2d 404 (1950); Western Casualty Co. v. Fox-Everett Co., 223 Miss. 388, 78 So.2d 363 (1955).

[293] Home Ins. Co. v. Newman, 147 Miss. 237, 111 So. 455 (1927).

[294] Motors Ins. Corp. v. Holland, 90 So.2d 392 Miss. (1956).

[295] 42 Am. Jur., Process § 135.

[296] Miss. Const. § 48 (1890).

[297] 42 Am. Jur., Process §§ 140, 122 (1957); see cases annotated, 85 ALR 1340.

[298] Arnette v. Smith, 165 Miss. 53, 145 So. 638 (1933); Miss. Code Ann. § 1896 (1942).

[299] 42 Am. Jur., Process § 141.

[300] 42 Am. Jur., Process § 145.

[301] 42 Am. Jur., Process § 146.

[302] Miss. Code Ann. § 1443 (1942).

[303] Arnett v. Smith, note 298 supra; 42 Am. Jur., Process § 156.

PROCEDURAL ASPECTS OF MOTIONS AND INSTRUCTIONS

*Taylor H. McElroy**

MOTIONS

A motion is a proposal intended to lead to action; in particular, it is a formal proposal made to a court. A motion is not a plea or pleading, but is an interlocutory procedure. An order predicated on a motion is one made by the court in the progress of the case requiring something to be done or observed, but not going to the merits of the controversy. It cannot be used to deal with the merits or settle important questions of the case since it is not a primary or plenary pleading. To attempt to settle the merits of the case by the use of a motion would constitute a want of due process of law under the Constitution.[1] The general principles appertaining to motions are: that it is the office of a motion to bring before the court some material incidental matter arising in the progress of the case that calls for an interlocutory order thereon; that a motion is made by and against the parties to the cause and the immediate officers of the court wherein the motion is made—note that it is not within the proper function of a motion to conduct thereunder that which amounts to another major litigation.[2]

A petition, in many respects, very nearly resembles a motion, and there seems to be no precise or positive boundary between them. Petitions are usually resorted to when a more detailed statement is required than can be conveniently contained in a notice of motion. Yet, either the one of the other is proper only when a cause is pending; or in a matter over which the court of chancery or the circuit court has jurisdiction under some special authority created by statute, and in which the statute directs that the jurisdiction created shall be exercised in a summary manner upon the petition.[3]

The Purpose of a Motion

The purpose of a motion is to bring to the attention of the court some pertinent matter or subject which arises in the progress of the case. Motions originated under the common law *ore tenus* and were very informal. The common practice today is to use the motion in the trial of the case, and it requires an interlocutory rule or order of the court which cannot appropriately or effectively be raised by any form of plenary pleading. We have many motions that are statutory, and the statute must be strictly followed in making a motion. All motions must be signed by the attorney and some require an affidavit. In some instances, it is difficult to determine whether it is a petition or a motion, but the requirements of the statute must be followed in both instances. Under the statutes, we have motions for continuances, for change of venue, to collect fines and costs, against officers in default, against constables for failure to perform their duty and pay over money, to suppress depositions, to quash indictments, to quash process or appearance, and for a special venire among many others.

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[1] Flournoy v. Smith, 3 How. 62 (Miss. 1938).

[2] Caperton v. Winston County Fair Association, 169 Miss. 503, 508, 153 So. 801 (1934).

[3] Hill v. Richards, 11 Sm. & M. 194 (Miss. 1848).

The motion carries by its name, without more, an indication of its nature and character. Generally, a motion during the trial of a cause is made by dictating it to the court reporter for the record.

Since it is desirable that court procedure be simplified, the motion is available for all purposes which may not be reached by any regular pleading, and the use of the motion has been approved where its need is so clear as to be fairly indisputable.[4]

In the absence of statute, motions will not be allowed to usurp the regular formal pleading.[5] However, in some instances, the remedy by plenary proceeding or pleadings will not always bar a motion when clearly the motion is the more speedy, economical and efficacious.[6]

Therefore, motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions or to dispose of the merits of the case.[7]

Motion Docket

In chancery court, a statute requires the clerk to keep a motion docket in which he enters motions without request as they are filed.[8] The dockets have a space for each motion and in this space the clerk copies the body of the motion so that the court may not only call the motion from the docket but may read it as there copied. The opposite party may consult this docket from time to time to be advised whether a motion has been made in a particular case and the nature of the order sought. This suggests, in chancery court, that ordinarily the motion is expected to be in writing; that the motion is not to be lengthy; and unless especially provided by statute in particular cases or unless the circumstances are such that justice so requires it, no notice to the opposite party is necessary other than the entry on the docket.[9]

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[4] Caperton v. Winston County Fair Association, 169 Miss. 503, 508, 153 So. 801 (1934); Strickland v. Humble Oil and Refining Company, 194 Miss. 194, 11 So.2d 820 (1943); Jenkins & Boyle v. Rogers, 184 Miss. 182, 185 So. 603 (1939); McDowell v. Minor, 158 Miss. 788, 131 So. 278 (1930); Federal Credit Company v. Newman, 16 So.2d 619 (Miss. 1944); Brashier v. J. C. O'Connor & Son, 181 Miss. 872, 180 So. 67 (1938).

[5] McDowell v. Minor, 158 Miss. 788, 131 So. 278 (1930); Love v. Love, 158 Miss. 785, 131 So. 280 (1930).

[6] Gridley v. Duncan, 8 Sm. & M. 456 (Miss. 1847); Pugh v. Boyd, 38 Miss. 326 (1860).

[7] McDowell v. Minor, supra at note 5; Gridley v. Duncan, 8 Sm.&M. 456 (Miss. 1847); Marshall v. Hamilton, 41 Miss. 229 (1866); Tulley v. Herron, 44 Miss. 626 (1871); McCalve-Brooks Co. v. Oil Works, 113 Miss. 500, 74 So. 332 (1917); Kehlor Flour Mills Company v. Reaves Grocery Company, 113 Miss. 31, 73 So. 866 (1917); Griffith, Mississippi Chancery Practice, §§ 274, 367, 400, 402 (2d ed. 1950); Jenkins & Boyle v. Rogers, 184 Miss. 182, 185 So. 603 (1939).

The statute does not provide for a motion docket in the circuit court and some counties do not have such a docket. However, by custom, some of the counties in the state have circuit court motion dockets and the attorneys may avail themselves of this local practice. When motions are filed, it is the better practice for the attorney to furnish the opposite party with a copy of the motion. Of course, this applies especially to statutory motions. Motions made *ore tenus* which are dictated to the court reporter for entry in the record should always be made in the presence of the opposing counsel, but unless a statute provides otherwise, an attorney does not have to furnish a copy to opposing counsel.

The Form and Contents of a Motion

Every motion made in a cause constitutes part of its history and is as much a part of the record as the declaration, plea, or judgment.[10]

The modern tendency is to make all motions in writing instead of orally. It is impossible in the trial when testimony is being taken to make all motions in writing, especially when they are not statutory and can be promptly dictated into the record. Motions are made orally when it is a matter of mere routine and fall distinctly within the pleadings or within other parts of the previously settled record, or it is clear that the granting of the order therein is manifestly a matter of right. Motions of substantial importance must be in writing, especially when the motion is based on extrinsic facts—that is on facts which lie outside the record. In such cases, a motion should be in writing supported by an affidavit setting up the facts. Unless the grounds are manifest without a statement of them, a motion must, in a fairly distinct way, state the grounds or reasons on which it is based, or it will be overruled.[11] However, it must be kept in mind that it is not the office of a motion to aver a fact. It cannot independently import a fact or facts into the record; it calls attention to facts, asks for an interlocutory order on the grounds averred, and unless the grounds are manifest, gives the grounds there-

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[8] Miss. Code Ann. § 1244 (1942).

[9] Griffith, Mississippi Chancery Practice, § 401 (2d ed. 1950).

[10] Puckett v. Graves, 6 Sm.&M. 384 (Miss. 1846).

[11] Huston v. Hayter, 6 How. 580 (Miss. 1842); Germain v. Harwell, 108 Miss. 402, 66 So. 396 (1914).

for. Its basis, in fact, must be derived from some other part of the record and when the facts are not already of record, an affidavit must be filed with the motion as an initial part of it.[12]

AFFIDAVITS

Any extraordinary proceedings before the court in vacation, whether on motion or petition, should be supported by an affidavit stating the supporting facts. Otherwise, proof must be made by witnesses. Commonly, a motion is very short and to the point when made before the court in the trial of a case, and is treated as mere routine as a part of procedure, and must briefly show the particular ground or grounds relied upon, and the nature of the order requested in fair and intelligible language. A motion must establish all the known grounds upon which the movant relies, and those not set up may be deemed as waived. It is confined to incidental matters in the progress of the suit, and cannot, except under a special statute, be used for the decision of doubtful, grave, or difficult questions involving substantially the merits of the case. If a supporting affidavit must be used, it should be as brief as is consistent with a full statement of necessary facts. Such motions as change of venue, motions for continuance, and motions for new trials due to newly discovered evidence require an affidavit, and of course the statute must be strictly followed.[13]

The motion and affidavit should point out, with particularity, the proof and its materiality to the issues involved in the case so that the court may be fully advised as to the question before it.

NOTICE

A party should be present in court with his process, and any action which merely affects the process can be made without formal notice to the other party. But where such action extends beyond the process, it is necessary that notice be duly given.[14] All motions made orally during the trial of the case require no notice since all parties are present in court and a record is being made. Motions which are to be made in writing require notice if the trial is not in progress. The better practice, since no provision is made by statute for a motion docket in circuit court, is to give a copy of the motion to the opposite party. In chancery court, the written motion requires notice, but if a motion is made in and for term time and is promptly entered on the motion docket, it is sufficient notice unless otherwise provided by statute or by fixed rules of the court.[15]

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[12] Griffith, Mississippi Chancery Practice, § 402 (2d ed. 1950).

[13] Ruffin v. Page, 109 Miss. 12, 67 So. 648 (1918); Phillips v. Cannon, 129 Miss. 658, 92 So. 557 (1922).

[14] Haley v. Williams, 8 Sm.&M. 487 (Miss. 1847).

[15] Griffith, Mississippi Chancery Practice, § 404 (2d ed. 1950).

In legal strictness, parties are bound to take notice of any motion entered on the motion docket during the pendency of the suit. However, the parties to a suit are not required to take constructive notice of a motion in vacation, or between judgment and the adjournment of the term of court, even though it is entered on the docket.[16] In actual practice, where complaint is made by either party of non-receipt of notice, even though notice is not required by statute, the courts are very liberal to see that a copy of the motion is given the opposite party so he may have adequate time to examine the motion and be advised of its contents. In some instances, the statement of the attorney making the motion that he has given the other party a copy is deemed sufficient. Experience of the courts has shown that attorneys will not or should not make untrue statements in such matters.

The opposite party cannot subsequently object that no notice was given where no objection was made when the motion was heard by the court. Objection should be made before the court hears the motion and especially where the court hears the motion on proof.[17]

Proof and Hearing on the Motion

If a motion is properly made, the movant has a right to have his motion heard and determined on its merits by the court at the proper time and to have such relief awarded to him as may be proper under the circumstances. Except to the extent that the matter may be controlled by statute or rules of the court, the conduct of hearings on motions is largely within the judicial discretion of the judge, and the exercise of his discretion is not subject to review unless he has abused it. When the parties appear and resist a motion on its merits without objection to its temporal and technical regularity, this operates to wave all previous irregularities in the motion, and such irregularities are waived unless objection upon that ground is made at the first opportunity.[18] A motion is at issue without further pleading, and it is the duty of the movant to support his motion by proof· The averments contained in a motion do not amount to proof of the facts therein stated.[19]

The burden of proof is on the movant, and the right to open and close arguments is the same as in trials on the merits. No formal response to a motion is required, and the movant must support it by proof unless the opposite party consents to it.[20] Orders rendered by the court on a motion are interlocutory, and, therefore, are not binding on the court in the further progress of the case. The court may set aside, revise or reshape the order according to justice and the rights of the parties before judgment is rendered, or before court has adjourned.[21]

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[16] See note 14 supra.

[17] Izod v. Addison, 6 How. 432 (Miss. 1841).

[18] Ibid.

[19] Reed v. State, 143 Miss. 686, 109 So. 715 (1926); Young v. State, 150 Miss. 787, 117 So. 119 (1928); Shaw v. State, 188 Miss. 549, 195 So. 581 (1940'); Shepard v. Johnston, 203 Miss. 120, 33 So.2d 614 (1948).

[20] Hudson v. Gulf Refining Co., 202 Miss. 331, 30 So.2d 66 (1947).

Some statutory motions, if not disposed of during the term, are continued by force of the statute without any order to that effect.[22]

It is often the practice in both chancery and circuit court after the court reporter has begun taking his notes in a case and especially during the trial, for motions arising in the actual progress thereof to be dictated into the record, and likewise the rulings of the court thereon. This use of the stenographic record is allowed in the interest of convenience and to prevent the loss of time that would result if these motions were required to be first reduced to writing, entered on the docket, and the order then drawn up for the minutes.

Illustrations of Common Use of Motions

Motions are commonly used in the following instances: Where a pleading is filed out of time; a pleading that is manifestly a sham; where a pleading is frivolous; a pleading that can have no legitimate place in the proceedings under any possible view; to withdraw a pleading; for continuance; for a new trial; to amend a pleading; to require an officer to pay over money; to exclude evidence and give a directed verdict; to quash process; for time in which to plead; for additional time in which to plead; for change of venue in civil and criminal cases; to dissolve an injunction; for special venire; in arrest of judgment; bill of exceptions; motion for writ of certiorari; to take depositions; to amend an error in judgment; improper argument in trial; motion for bond; to protect property; for duces tecum; to be allowed to obtain papers from clerk's office; motion to transfer chancery or circuit court; to file new pleas; to quash execution and set aside a sale; officers improperly handling funds; where no pleading in answer to a declaration is on file, as well as others.

Statutory Requirements for Motion for Continuance

It is required by statute that on all applications for a continuance the party shall set forth in his affidavit:

1. The facts which he expects to prove by his absent witness or documents in order that the court may judge the materiality of such facts.
2. The name and residence of the absent witness.
3. That the party has used due diligence to procure the pres-

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[21] Hill v. Richards, 11 Sm. & M. 194 (Miss. 1848); Johnson v. Success Brick Company, 104 Miss. 207, 61 So. 178, *sugg. of error sustained,* 62 So. 4 (1913).

[22] Miss. Code Ann. § 1649 (1942); O'Branon v. Greenville Commercial Body Company, 159 Miss. 68, 132 So. 87 (1931).

ence of the absent witness, or the absent document, as the case may be, stating what diligence he has used.

4. The party must always allege that the motion for continuance is not sought for delay only, but that justice may be done.

The court may grant or deny a motion for continuance at its discretion, and, in civil cases only, may of its own motion cross-examine the party making the affidavit. The opposite party may also cross-examine and may introduce evidence by affidavit or otherwise for the purpose of showing the court that a continuance should be denied. No application for a continuance shall be considered in the absence of the party making the affidavit, unless his absence be accounted for to the satisfaction of the court. A denial of the continuance shall not be a ground for reversal unless the Supreme Court shall be satisfied that injustice resulted therefrom.[23] The statutes must be strictly followed as to the requirements of affidavits,[24] and a motion for continuance that does not comply with the requirements of the statute is properly overruled by the court. We have many statutory motions and each should be studied with care and followed strictly.

INSTRUCTIONS – PROCEDURAL ASPECT OF

The instructions given in a law suit contain the principles of law applicable to the case.[1] Where there is no evidence upon which to predicate an instruction, it is erroneous to give it.[2] All instructions must be based on the facts of the case,[3] and an instruction concerning points not raised by the evidence are properly refused.[4] The proper practice is to refuse an instruction to the jury on a correct principle of law, if that principle is inapplicable to the facts of the case.[5] In a case in which the evidence supports but one theory upon which plaintiff is entitled to prevail, an instruction which might mislead the jury into another and different theory should not be given.[6]

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[23] Miss. Code Ann. §§ 1520, 2522 (1942).

[24] Lamar v. State, 63 Miss. 265 (1885); Bone v. State, 207 Miss. 20, 41 So.2d 347 (1949); Hinton v. State, 175 Miss. 308, 166 So. 762 (1936); Lewis v. State, 56 So.2d 397 (Miss. 1952).

[1] Miss. Code Ann. § 1530 (1942).

[2] Burnley v. Mullins, 86 Miss. 441, 38 So. 635 (1905); American Cent. Ins. Co. v. Antrim, 88 Miss. 518, 41 So. 257 (1906); Bank of Newton v. Simmons, 96 Miss. 17, 49 So. 616 (1909); Baldwin v. Alabama & V. R. Co., 96 Miss. 52, 52 So. 358 (1910); New Orleans & N.E.R. Co. v. Williams, 96 Miss. 373, 53 So. 619 (1910); Hooks v. Mills, 101 Miss 91, 57 So. 545 (1912); Yazoo & M. Valley R. Co. v. Dyer, 192 Miss. 870, 59 So. 937 (1912); McLeod Lumber Co. v. Anderson Mercantile Co., 105 Miss. 498, 62 So. 274 (1913); Cumberland Telephone and Telegraph Co. v. Cosnaham, 105 Miss. 615, 62 So. 825 (1913); Yazoo & M. Valley R. Co. v. Aden, 106 Miss. 860, 64 So. 790 (1914); J. J. Newman Lumber Co. v. Dantzler, 107 Miss. 31, 64 So. 931 (1914); Western U. Tel. Co. v. Robertson, 109 Miss. 775, 69 So. 680 (1915); Collins v. Union & Farmers Bank, 110 Miss. 506, 70 So. 581 (1916).

[3] Fairfield v. Louisville & N. R. Co., 94 Miss. 887, 48 So. 513, 136 Am. St. Rep. 611 (1909); Easley v. Alabama G. S. R. Co., 96 Miss. 396, 50 So. 491 (1909); Hunnicut v. Alabama G. S. R. Co., 50 So. 697 (Miss. 1909).

[4] Mobile, J. & K. C. R. Co. v. Jackson, 92 Miss. 517, 46 So. 142 (1908); Kneale v. Dukate, 92 Miss. 201, 46 So. 715 (1908).

[5] Mississippi F. Ins. Co. v. Dixon, 133 Miss. 570, 98 So. 101 (1923).

The word "instruction" could apply to any direction given by the court, but, in a narrowed and more technical sense, our courts hold that the instructions are directions in reference to the law of the particular case. They are an exposition of the principles of the law applicable to the case at hand, or some other branch or phase of the case which the jury is bound to consider in order to render a verdict establishing the rights of the parties in accordance with the facts proven; or which the jury is bound to apply in order to render such a verdict as will, in the state of facts proven at the trial to exist, establish the rights of the parties in the suit before the court.[7]

It is provided by our statute that in any case, either civil or criminal, the judge is to instruct the jury, but it is well to remember the following rules:[8]

1. The judge shall not sum up or comment on the testimony.
2. The judge shall not charge the jury as to the weight of the evidence.
3. The judge, at the request of either party, shall instruct the jury upon the principles of law applicable to the case.
4. All instructions must be requested by the parties in the case.
5. All instructions must be in writing.
6. All alterations or modifications, given or refused by the court, shall be in writing.
7. The clerk, before they are read or given to the jury, shall mark all instructions requested by either party, or given by the court, as being "given" or "refused" as the case may be.
8. All instructions so marked shall be a part of the record on appeal without a bill of exceptions.
9. All instructions given by the court may be taken out by the jury after the arguments of the attorneys in the case.

In actual practice the instruction requested by each party, when they are given, are read to the jury by the attorneys before they argue the case. In some instances, attorneys read their instructions but do not argue the case before the jury.

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[6] Owen v. Sumrall, 204 Miss. 15, 36 So.2d 800 (1948).

[7] See notes 1, 2, 3, 4, 5, 6 supra. Scoggins v. Vicksburg Hospital, Inc., 91 So.2d 837 (Miss. 1957); Moak v. Black, 92 So.2d 845 (Miss. 1957); Vanderslice v. Shoemake, 102 So.2d 804 (Miss. 1958); Cobb v. Williams, 90 So.2d 17 (Miss. 1956); Hamilton v. McCry, 91 So.2d 564 (Miss. 1956); Moore v. Herman Guy Auto Parts Inc., 92 So.2d 373 (Miss. 1957); Jenkins v. Jenkins, 100 So.2d 789 (Miss. 1958); Moore v. Taggart, 102 So.2d 333 (Miss. 1958).

[8] Miss. Code Ann. § 1530 (1942).

AUTHORITY OF THE JUDGE

The judge does not have the authority to originate instructions not requested by an attorney in the case.[9] Even before the Constitution of 1890, the Court has uniformly held that the circuit judge cannot instruct the jury of his own motion, but can only instruct when written requests are made. When instructions have been presented, the judge may modify them, if incorrect, so as to conform to the law. It is manifest from the language of the statute that the judge is denied the authority or power of originating independent instructions of its own motion, not called for or rendered necessary by those requested by counsel. The parties, and the parties only, have the right to indicate by written request the points upon which they respectively desire the jury to be informed as to the law. Under our system, it would not be proper for the court to instruct sua sponte. If the instructions are correct and pertinent, the safe practice would be to give them as requested. It may sometimes happen that the same principle, with a slight variation of language, is embraced in several instructions, or that the court is asked to give an instruction which is but a repetiton of one already given, or it may appear that the language employed by the counsel is vague and obscure. The court may well decline to encumber the record with a repetition of instructions already granted, and should correct any obscurity in order that the jury may be properly advised as to the law of the case.[10]

REQUEST FOR INSTRUCTION

The law forbids the judge to give an instruction not requested by the parties.[11] If counsel fails to request an instruction, he cannot complain that one was not given, even though it might be applicable to the case.[12] If a jury retires to consider their verdict, but returns to the court room to ask for further instructions, and the judge—without request from the state or the defendant—orally instructs the jury on the law of the case, it has been held that this further instruction to the jury by the court of its own motion is improper.[13]

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[9] Watkins v. State, 60 Miss. 323 (1882); Dement v. Summer, 175 Miss. 290, 165 So. 791 (1936); Bangs v. State, 61 Miss. 363 (1883); Masonite Corp. v. Lochridge, 163 Miss. 382, 141 So. 758 (1932). Parties cannot complain of instructions which are consented to. It has been held that the parties cannot complain of oral instructions given to the jury where from the record it appears that the counsel agreed that the instruction or instructions might be given. Kelly v. State, 95 So. 690 (Miss. 1923).

[10] Edwards v. State, 47 Miss. 581 (1873); Archer v. Sinclair, 49 Miss. 343 (1873); Masonite Corp v. Lochridge, 163 Miss. 382, 141 So. 758 (1932).

[11] James v. State, 106 Miss. 353, 63 So. 669 (1913); Johnson v. State, 106 Miss. 94, 63 So. 338 (1913); Dixon v. State, 106 Miss. 697, 64 So. 468 (1914); Pingle v. State, 108 Miss. 802, 67 So. 455 (1915); Davenport v. State, 121 Miss. 548, 83 So. 738 (1920).

[12] Tatum v. State, 142 Miss. 110, 107 So. 418 (1926).

[13] Edwards v. State, 47 Miss. 581 (1873); Stewart v. State, 50 Miss. 587 (1874); Bangs v. State, 61 Miss. 363 (1883); Watkins v. State, 60 Miss. 323 (1882); Williams v. State, 32 Miss. 389 (1856); Gilbert v. State, 78 Miss. 300, 29 So 477 (1901).

WRITTEN INSTRUCTIONS

The court has no authority to instruct a jury sua sponte.[14] All instructions must be in writing.[15] The trial judge is not permitted to instruct the jury orally in regard to the verdict which they are authorized to render.[16] The judge should take care not to infringe upon the province of the jury, and should try not to influence the verdict, but he has the right to give reasons for a ruling if he desires and to show why, in his opinion, the reasons advanced for a contrary ruling are unsound. Passing on questions of evidence is considered merely a ruling of the court, and where it appears that the judge had no intention of instructing the jury but was merely trying to clarify some question asked or some answer given, he may give a reason for the ruling. The statute does not place the judge in a strait-jacket, nor does it require him to remain silent during the progress of a trial. While it may be safer for him to rule without giving his reasons, he has the right to give such reasons if he so desires, and to show why, in his opinion, the reasons advanced for a contrary ruling are unsound. In so doing, the judge should not go too far and transgress the proprieties. Of course, "an overspeaking judge is no well-tuned cymbal . . . neither is an aphonic dummy a becoming receptacle for judicial power."[17]

FORM OF INSTRUCTION

The instructions should be on legal cap paper and should never be written out on a narrow strip. The better practice is to write long instructions on a full sheet of paper and short instructions on at least a half sheet. This is due to the fact that the clerk must file the instructions.

The usual form is, "The court instructs the jury for the plaintiff . . . ." If the instruction is on the evidence, the form should be, "The court instructs the jury for the plaintiff that if you believe from the evidence . . . ."[18]

The court will not reverse a case because the instruction is not happily phrased, or because it is not exactly technically correct. If the instruction is not misleading, or if the inaccuracy complained of could have no influence on the jury in reaching a verdict, then it cannot be said that the instruction is improper. Substantial accuracy is all that is required in an instruction, and unless the court feels that the jury may have been misled, it will not reverse.[19] The fact that an instruction is technically inaccurate will not, alone, cause the reversal of a judgment; when the case is examined on appeal as a completed trial and substantial error has not been committed, the judgment will usually be affirmed.[20] The philological inaccuracy in an instruction is no ground for reversal of a judgment if the law is substantially correct.[21]

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[14] Jones v. State, 276 Miss. 186, 62 So.2d 217 (1953).

[15] Miss. Code Ann. § 1530 (1942).

[16] Simmons v. State, 107 Miss. 463, 65 So. 511 (1914).

[17] Bompus v. State, 166 Miss. 276, 144 So. 897 (1932); Price v. State, 41 So.2d 37 (1949).

[18] Hatcher v. State, 210 Miss. 661, 50 So.2d 387 (1951).

When Instructions May Be Granted

The correct practice, under our system, is for the court to pass on all instructions requested by both sides before the argument to the jury begins, but this should not be done secretly. This rule should be deviated from only in rare and emergent occasions in the discretion of the court, and even then only with opportunity to the opposite party to prepare and request any counter instruction applicable to their view of the facts; otherwise, great injustice might be done the defendant or plaintiff in favor of the party with the closing argument. Underhanded tactics should never characterize trials, especially trials involving life or liberty. The judge should so deport himself that no juror or bystander can determine his view of the facts. An unbiased jury should pass on facts; and this principle, on the theory of the law prevailing in Mississippi, is designed for the protection of the innocent since it is presumed that all men are innocent until proven guilty in the legal mode based on a fair and impartial administration of equal and exact justice.[22] Counsel on both sides should always know of the instructions given by the court even if they have to be interrupted in their argument before the jury. Generally, it is improper practice to give an instruction during argument to the jury, but this is proper in a case where the charge was clearly correct, and not so adroitly prepared as to possibly mislead the jury, and no injustice will be done to either party. In such case the court will not reverse for deviation from the usual procedure.[23] The requirement that requested instructions be presented to the court before argument is made to the jury is a reasonable one, and the court has the power to refuse a request to deviate from this procedure.[24] Our courts have held that though the orderly procedure would require all instructions to be submitted before the jury retires, accent is upon a clear understanding of, and instruction upon, the controlling issues and not upon procedural formulas. In the absence of prejudice, it is more important for the jurors to be properly instructed than it is for the instructions to be given at the proper time, unless they are secretly instructed.[25]

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[19] Meridian Sanatorium v. Scruggs, 21 Miss. 330, 83 So. 532 (1920); Neely v. City of Charleston, 204 Miss. 360, 37 So.2d 495 (1948).

[20] Ibid.

[21] Oliver v. State, 39 Miss. 526 (1860).

[22] Montgomery v. State, 85 Miss. 330, 37 So. 835 (1905).

[23] Wood v. State, 64 Miss. 775, 2 So. 247 (1887); Montgomery v. State, supra note 23.

[24] See note 18 supra.

CORRECTION, MODIFICATION, AND WITHDRAWAL OF INSTRUCTIONS

The judge may modify or correct an instruction so as to conform to the law of the case.[26] Our court has permitted amendments to instructions even after argument where the opposing counsel is given an opportunity to reply and to make comment thereon with no limitation of time.[27] A party cannot complain that a modified instruction was erroneous where he used the instruction, as modified, in the trial.[28]

FILING OF INSTRUCTIONS

The clerk, before the instructions are read or given to the jury, is required to mark all instructions requested by either party, or given by the court, as being "given" or "refused" as the case may be.[29] The common practice is to give the instructions requested to the judge for his approval. The judge marks the instructions either "given" if they apply to the case and "refused" if he is of the opinion that the instruction is not a reflection of the law of the case. The clerk then stamps each instruction accordingly and signs his name to the instruction.

The Supreme Court has held that where all the instructions are either attached to each other and marked and filed by the clerk, or where each contains a notation of some kind sufficient to show the action of the court and all the instructions are filed by the clerk, it is sufficient for the purpose of constituting a part of the record on appeal.[30]

Instructions appearing in the record, without any statement as to whether they were requested by the prevailing party and which are not marked "given" or "refused" by the clerk, are not a part of the record.[31] Any person desiring to object to the modification or correction of instructions requested by him and who wishes to insist that the instructions as originally drawn were correct, should have the instructions marked to show that it was refused.[32]

All peremptory instructions at the close of the testimony should be marked "given" or "refused," and parties should remember to have the instructons filed by the clerk. However, when at the close of the plaintiff's case a motion is made for a directed verdict, and it is copied in the record, and sustained by the court, it does not need to be marked by the clerk; likewise, if at the close of all the testimony a motion is made for a directed verdict, it need not be marked or filed by the clerk where the motion is copied into the record, and the record shows that the motion was sustained by the court.[33]

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[25] Wages v. State, 210 Miss. 187, 49 So.2d 246 (1950); Goss v. State, 205 Miss. 177, 38 So.2d 700 (1949).

[26] Masonite Corp. v. Lochridge, 163 Miss. 382, 141 So. 758 (1932); Louisville & N. R. Co. v. McCaskell, 98 Miss. 20, 53 So. 348 (1910).

[27] Rose v. State, 170 Miss. 550, 155 So. 341 (1934).

[28] Holmes v. State, 192 Miss. 54, 4 So.2d 560 (1941).

[29] Miss. Code Ann. § 1530 (1912).

[30] Gulf and S. I. R. Co. v. Boswell, 85 Miss. 313, 38 So. 43 (1905).

[31] Shelby v. Brown, 24 So. 531 (Miss. 1899).

[32] Mississippi Public Service Co. v. Collier, 183 Miss. 271, 183 So. 379 (1938).

INSTRUCTIONS ON THE WEIGHT OF THE EVIDENCE

The judge shall not charge the jury as to the weight of the evidence.[34] Instructions should not be argumentative or emphasize certain portions of the evidence, and a refusal of such instructions is not reversible error. The court should never assume facts in giving instructions, and an instruction is erroneous if it assumes as true a disputed fact of vital importance.[35]

The weight, tendency, and effect of testimony is to be ascertained and settled by the jury. Their freedom of action on the subject should not be restrained by instructions from the court. The conviction of the court as to the tendency of testimony should not be impressed upon the jury any further than is done by permitting such testimony to go to the jury.[36]

It often happens that erroneous instructions are given which are cured by other instructions. An instruction often given but condemned by the Supreme Court is one which instructs the jury that the plaintiff is to prove every material allegation contained in the declaration by a preponderance of the evidence, and unless the plaintiff has proved every material allegation of the declaration, it is the duty of the jury to find for the defendant. In reviewing the validity of this instruction, our Court has said it is not proper for an instruction to refer a jury to the pleadings without setting forth some applicable principle of law; the law of the case should be set out in the instructions and the jury should not be invited to resort to the pleadings to complete the instructions and determine what the law is. The applicable law and facts of the case should be simply stated without referring the jury to the declaration. Such an instruction is unintelligible and obscure because, without any formula to guide them, the jury is referred to the declaration to determine what allegations of the declaration are material. The jury is entitled to have the law of the case, as given by the court, written out in full in the instructions.[37] Though our court has condemned such an instruction, where it is clarified by other instructions, the Court has held the instruction to be harmless error.[38]

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[33] North v. Delta Chevrolet Co., 188 Miss. 252, 194 So. 478 (1940).

[34] See note 29 supra.

[35] French v. Sale, 63 Miss. 386 (1885); Williams v. State, 32 Miss. 389 (1856); Edwards v. State, 47 Miss. 581 (1873); Poteria v. Brookhaven, 93 Miss. 774, 49 So. 617 (1909); Windfield v. Magee, 98 So.2d 130 (Miss. 1957); Wells v. Bennett, 100 So.2d 344 (1958)

[36] French v. Sale, 63 Miss. 386 (1885).

[37] Windfield v. Magee, 98 So.2d 130 (Miss. 1957).

PEREMPTORY INSTRUCTIONS

At the conclusion of the plaintiff's testimony, or the testimony of the defendant, the court may grant a peremptory instruction. A peremptory instruction means taking all the evidence as true for either the plaintiff or defendant, the movant is entitled to judgment from the court without the jury passing on the evidence. Our State has reposed this power and duty to the trial judges to grant peremptory instructions and even to set aside verdicts. These powers have been recognized as an integral part of our State Constitution.[39] The statute which forbids judges to comment on the evidence or to give any instruction unless requested by the parties, leaves unaffected the judicial authority to direct a verdict. A peremptory instruction is analogous to a demurrer to the evidence, and is usually governed by the same rules. The peremptory instruction is never allowed unless the evidence is plainly and unmistakably insufficient to maintain the issue, or unless the court would feel constrained to set aside a verdict for the opposite party not warranted by the evidence.[40] Where the court feels no other verdict could reasonably have been allowed to stand, the judge should grant a peremptory instruction, and in determining the propriety of a peremptory instructon, the evidence is to be taken more strongly against the party who makes it.[41]

In determining the question of the propriety of a peremptory instruction and the court's action thereon, the evidence must be taken more strongly in favor of the opposite party. Every material fact which is in evidence and tends to be in the opposite party's favor must be taken as true.[42] In other words, the court cannot direct the verdict for either party when the evidence would authorize the jury to find for the other party.[43] When a peremptory instruction is granted, it is not necessary that the jury retire; the judge may enter the judgment without the jury's action.[44]

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[38] Southland Broadcasting Co. v. Tracey, 210 Miss. 836, 50 So.2d 572 (1951); Windfield v. Magee, 98 So.2d 130 (Miss. 1957).

[39] Jakup v. Lewis Grocery Co., 190 Miss. 444, 200 So. 597 (1941).

[40] Anderson v. Columbia Telephone and Telegraph Co., 86 Miss. 341, 38 So. 786 (1905).

[41] Wooten v. Mobile & Ohio Railroad Co., 89 Miss. 322, 52 So. 131 (1906); Clark v. Mosye, 48 So. 721 (Miss. 1909); Fletcher v. Sovereign Camp, W. O. W., 81 Miss. 249, 32 So. 923 (1902); American Trading Co. v. Ingram Day Lumber Co., 110 Miss. 31, 69 So. 707 (1915).

[42] Yates v. Houston & Murray, 111 Miss. 881, 106 So. 110 (1925).

[43] Taylor v. Desota Lumber Co., 137 Miss. 829, 102 So. 260 *modified,* 103 So. 82 (1925).

[44] Edwards v. Yazoo and M. V. R. Co., 112 Miss. 791, 73 So. 789 (1917).

RECORD ON APPEAL

The Statute states that all instructions properly marked and filed, shall be a part of the record on appeal without exception being taken.[45] The Rules of the Supreme Court provide that the right of review of any ruling of the trial court shall not depend upon the parties having made a motion for a new trial where the instructions are properly marked and made a record in the case.[46] The Statute provides in unmistakable terms that the clerk shall mark all instructions requested by either party or given by the court as being given or refused, as the case may be, and all instructions so marked shall be a part of the record on appeal without a bill of exceptions. Therefore, it is no longer necessary to except to the giving or the refusing of instructions during the progress of the trial, nor is it necessary to make them the ground of a motion for a new trial if properly marked by the clerk.[47] When instructions are properly marked and filed, the court treats them as though objected to and exceptions taken at the time it was "given" or "refused" by the court.[48]

Where an instruction is modified and corrected, the party should get his objection to the court's change of the instruction in the record, or have the court refuse to give the instruction. Otherwise, the instruction becomes a part of the record as an instruction of the court after the change is made and the instruction is marked by the clerk. In case the party does not object and get his objection in the record, he may ask for a bill of exceptions from the court.[49]

The proper form after the court marks the instruction "given" or "refused" is as follows: "Given and filed" or "Refused and filed" the ____________ day of ________________________ (Mo.), 195______.

____."[50]

Circuit Clerk

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[45] Miss. Code Ann. § 1530 (1942).

[46] Rules of the Supreme Court, R. 6; Coccora v. Vicksburg Light and Traction Co., 126 Miss. 713, 89 So. 257 (1921).

[47] Hodges v. Town of Drew, 172 Miss. 668, 159 So. 298 (1935); Sovereign Camp W. O. W. v. Sloan, 136 Miss. 549, 101 So. 195 (1924); Cox v. State, 141 Miss. 607, 107 So. 7 (1926).

[48] Cox v. State, supra note 47.

[49] Mississippi Central Railroad Co. v. Hardy, 88 Miss. 732, 41 So. 505 (1906); Colemen v. Yazoo and M. Valley R. Co., 90 Miss. 629, 43 So. 473 (1907); Louisville & N. R. Co. v. McCaskell, 98 Miss. 20, 53 So. 348 (1910).

[50] Gulf Coast Stevedoring Co. v. Gibbs, 124 Miss. 188, 86 So. 582 (1920), *sugg. of error overruled,* 86 So. 763 (1921).

POWER OF THE LAW COURT OVER ITS JUDGMENTS: (A) DURING THE TENURE OF THE TERM IN WHICH THEY ARE RENDERED; (B) AFTER ADJOURNMENT OF THE TERM AT WHICH THEY ARE RENDERED

*M. M. McGowan**

The authority to vacate or set aside its own judgments is inherently incident to all courts of record or of general jurisdiction. The right and authority being inherent in the court, no special statutory authority so to do is required. It is of common law origin.

As is stated in *Corpus Juris Secundum*: "During the term the power of the court is absolute and the court may even change its decision on the merits; accordingly, any consideration sufficient to move the equitable discretion of the court is ground for opening or vacating the judgment during the term."[1]

In spite of the above statement defining the court's power and the source of its power over its own judgments during and after the term at which they are rendered, it might appear paradoxical to follow with another general statement of law, to wit: That a court has no power to correct, amend, open or vacate a judgment after the expiration of the term.

However, the two general statements above are not actually contridictory due to the fact that the first deals with the inherent power of the court over its judgment and the second is a general statement of law protecting the finality of judgments as a necessary postulate of the law, and refers actually to the setting aside of judgments after the term. Reduced to its meaning which harmony dictates, it means that while the court has inherent power over its judgment, it can only be exercised under certain exceptional circumstances, and under conditions where not only discretion but desire can play no part. In fact, it is the purpose of this article to discuss those certain exceptional circumstances and conditions which constitute an exception to the rule.

Many of the states have statutes dealing with this specific subject; that is, the manner, method and conditions under which courts may set aside judgments after the expiration of the term at which they are rendered. Mississippi has no such statute specifically designed to accomplish any such purpose. However, we do have certain statutes which bear upon the subject and are related to it, and from the essence of which and provisions of which we are guided, in some measure at least, in determining when a judgment may be set aside.

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*Circuit Judge, Seventh Judicial District, Jackson, Mississippi.

[1] 49 C.J.S., Judgments, § 266.

THE STATUTES

I think at the outset these statutes ought to be referred to and briefly examined as to their content and as to the measure in which they affect the subject. These statutes are as follows:

First, Section 1670, Code of 1942, pertains to the correction of mistakes, miscalculations and errors connected with the entry of a judgment. It deals exclusively with mistakes and errors of calculation as well as findings, and is usually incident to some error made by the clerk in entering the judgment or translating the verdict of the jury into the final judgment. Under such conditions a judgment may be corrected and amended upon proper notice to the opposite party. One feature worthy of note in connection with this section and the rule of law applicable thereto is that there must be, somewhere among the court papers or the record in the case, some actual document from which the true facts may be gleaned, or else the matter must be clearly within the memory and understanding of the presiding judge.

Second, Section 1544 must be considered. This is our Statute of Jeofails, which is quite lengthy, and it is not necessary to set the same out. The purpose of the Statute of Jeofails, as is well understood by the members of the Bar of this state, is to save the validity of the final judgments of courts from the almost unavoidable entrance into the proceedings of certain deviations from absolute accuracy both in the pleadings and conduct of the trial. But for this statute few judgments would ever stand due to the lack of absolute metaphysical certainty in processes leading to a culmination in a final judgment of the court.

Third, Section 1547 deals with the subject. The title of this section is: "Judgments—When Final."[2] This section more nearly parallels the sections in other jurisdictions which deal specifically with the question of setting aside judgments. The theme of the section actually deals with the finality of the judgments of the court.

It is noted that Section 1547 makes a distinction in the nature of the basic cause of action sustaining the judgment. If the judgment be upon a writing showing "the sum due, or on an open account, where a copy of the account is filed with the declaration . . ." the judgment shall not be set aside except at the term of court at which it was rendered. The second part of the section deals with unliquidated claims where the amount of judgment, following an interlocutory or default judgment as to liability, has to be determined by a writ of inquiry. The statute further provides that after a writ of inquiry and final judgment, the judgment shall not be set aside unless good cause be shown therefor on oath. This part of the statute says nothing about whether such action to set the judgment aside would have to be brought during term time or not. There is a clear implication in the statute that a distinction is sought to be made between a suit for a sum due on an open account or liquidated debt, and a suit sounding in tort where damages are unliquidated and have to be settled by writ of inquiry pursuant to an interlocutory judgment fixing liability. This distinction was most strenuously argued in a case in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and was efficient to avoid the setting aside of the judgment, and was persuasive against setting aside a judgment which, under all the conditions and circumstances, might otherwise have been set aside.

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[2] Miss. Code Ann. § 1547 (1942): "In actions founded on an instrument of writing showing the sum due, or on an open account, where a copy of the account is filed with the declaration, if judgment be rendered on demurrer, by confession, or by default, the clerk shall calculate the amount due for principal and interest, and judgment shall be entered therefor and be final, if not set aside during the term. And in all actions where the sum due does not so appear, and in all actions sounding in damages, if the defendant does not plead, interlocutory judgments may be taken, on which writs of inquiry shall be awarded, which may be executed at the same term either by the jurors attending court or by the judge, at the option of the plaintiff. And after a writ on inquiry shall be executed, and judgment rendered thereon by the court, the same shall not be set aside unless good cause be shown therefor on oath; and in such case the defendant shall plead immediately, and the plaintiff shall not thereby be delayed of his trial."

However, regardless of the apparent implication which arises from the reading of the statute, a fair appraisal of the legal aspects involved leads to the conclusion that all judgments are in the same category after the expiration of the term at which they are rendered. They cannot be set aside and the court has no jurisdiction over them as a general proposition except when the prevalence of similar conditions authorize the setting aside of the judgment later to be discussed.

Fourth, Section 1646, is the section providing for new trials. It is true that the commentaries generally do not classify statutory provisions which grant new trials as statutes properly within the purview of the subject here under discussion. However, it appears that since the vacating and setting aside of judgments after the expiration of the term due to some of the justifiable reasons to be noted, a new trial is often granted, this section is properly classified as a statute applicable to the question under discussion.

With these preliminaries and statements of our statutory provisions, we will turn now to a discussion of the setting aside of judgments as defined in the first portion of the classification; that is, judgments rendered during the term time. As stated above, the power of the court over its judgments during term time is said to be absolute. The court may set aside a judgment and grant a new trial, or the court may set aside a judgment and reinstitute a previously declined motion for a directed verdict and enter a final judgment thereupon. By strict analysis, it is hard to determine what other practical results could follow the setting aside of a judgment during the term time. It is for this other reason that it seems that our statute on granting new trials is properly relegated to the topic herein discussed. In fact, various conditions may arise to prompt the court to take the action culminating in one of these results. One, of course, would be excusable neglect on the part of litigant or counsel in pursuing the cause or attending to its conduct in the court. Trial judges are oftentimes importuned and heavily pressured to set aside judgments where counsel, for some excusable reasons, has failed to appear on the appointed day of the trial of the cause and has suffered a default. Dealing with such cases is one of the heaviest burdens that a trial judge must bear. His desire to be generous and lenient is often met with the challenge that litigants and sometimes counsel have a vested interest in their rights of action and in the processes of law available to them in the procurement thereof.

CONDITIONS AND CIRCUMSTANCES WARRANTING THE SETTING ASIDE OF A JUDGMENT AFTER EXPIRATION OF THE TERM

The conditions and circumstances warranting the setting aside of a judgment after the expiration of the term in our jurisprudence, with some exceptions, conform to general rules prevailing in other jurisdictions and the conclusions reached in the commentaries such as *Corpus Juris Secundum* and *American Jurisprudence,* as well as the case law texts.

One more word with reference to the setting aside of judgments during term time might be appropriate. The matter lies so exclusively within the discretion of the court that the subject does not merit too extensive exploration. In such cases where the action of the court can be motivated by nothing other than the natural desire to see justice done, the subject matter is quite distinctly removed from the rather stern rules governing the finality of judgments.

Although as will be pointed out later the equity courts can in some cases relieve from judgments where the law courts cannot, it might be well to state here that the rule with reference to setting aside money judgments after the expiration of the term is the same in our equity jurisprudence as it is in the law courts. Mississippi is one of the few jurisdictions where separate equity and law courts are maintained. While the general theory of equity jurisprudence had its inception centuries ago in the search for relief from the strictures and rigidity of the common law courts of England, still in our practice a decree, particularly a money decree, has exactly the same degree of finality as that of a judgment in the law court. In *Guest v. Smith,*[3] Judge Anderson said that a commuted lump sum divorce alimony award could not be set aside after court term because the right to the money became vested. He quoted authorities from New York, Nebraska and Illinois. Of course, this theory has no application where the equity court, due to the essential nature of the cause, retains jurisdiction of the matter involved. Neither does it have application to relief in chancery from certain hardships beyond the reach of the law courts.

THE DECISIONS

In *Lamar v. Houston,*[4] the court held that a judgment or decree might be attacked for fraud on the jurisdiction of the court, and that the attack might be made either directly or collaterally. On this point the opinion quotes *Plummer v. Plummer,*[5] *Christian v. O'Neal,*[6] *Richardson v. Brooks,*[7] and a number of more recent cases.

It is well to note, however, that in the *Lamar* case[8] the emphasis placed upon the words "fraud upon the jurisdiction of the court" should be carefully observed. The decision reaffirms the well-established doctrine in this state that judgments may not be attacked after the expiration of the term except under the most serious circumstances, or such as when the judgment is absolutely void or a fraud upon the jurisdiction of the court has been practiced.

Furthermore, it is noteworthy that in the opinion in the *Lamar* case the relief sought was denied on account of laches, although it was ruled the judgment was void because of fraud on the jurisdiction of the court.

In the case of *Alabama and Vicksburg Railway Company v. Bolding,*[9] Judge Campbell opens his opinion with the following:

> "The only ground on which the motion to vacate the judgment could be sustained is that it is void. Mere irregularities—questions of error or no error—such as might cause a reversal on appeal, and for which the judgment would not be pronounced void, cannot be availed of by motion before the court which rendered the judgment. It cannot, at a term subsequent to the judgment, reverse or annul it for mere errors of law in the proceedings. Only this court can do that."

The above quotation from Judge Campbell's opinion is a fair and comprehensive statement of the fundamental rule in Mississippi governing the vacating and setting aside of judgments after the term expires.

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[3] 100 Miss. 457, 56 So. 166 (1911).
[4] 182 Miss. 260, 184 So. 293 (1938).
[5] 37 Miss. 185 (1859).
[6] 46 Miss. 669 (1872).
[7] 52 Miss. 118 (1876).
[8] Lamar v. Houston, supra note 4.
[9] 69 Miss. 255, 13 So. 844 (1891).

A judgment will be set aside after the expiration of the term where there has been no service of process. Due process of law under the Fifth and Fourteenth Amendments makes the proper service of process an indispensable element to the procuring of a valid judgment. Judge Campbell in the *Bolding*[10] case so ruled. In a case in the First Judicial District of Hinds County, Mississippi, a judgment rendered at a former term was set aside on account of the fact that the summons was handed to an employee of the corporation unauthorized to receive process.

An example of the strictness of proof that the judgment must be absolutely void before a law court at a subsequent term may set it aside is found in the case of *McIntosh v. Munson Road Machinery Company*.[11] This case illustrates the degree of hardship that the court would tolerate in order to protect the finality of judgments in the law courts. The judgment was in the county court, by default, with an allegation that no answer had been filed. The reported case arose out of a proceeding against the sheriff to exact a penalty for not levying an execution. It appears that at a subsequent term of the county court the judgment was set aside when the court was advised of the fact that a general issue plea had been filed, but its filing had not been noted on the docket and it had been lost from the court papers. The plaintiff proceeded by motion under the statute against the sheriff for failure to levy the execution. Upon denial of the petition by the county court and circuit court for the reasons above alleged, the appeal was taken to the Supreme Court by McIntosh. The court ruled, quoting a number of earlier decisions, that a default judgment where there is a plea on file is an erroneous judgment and would be reversed upon appeal to the Supreme Court, but that the county court had no right at a subsequent term to arbitrarily set aside a judgment, good and valid on its face, for this reason. The court used this language, "But our attention has not been called to a single case in which a judgment has been condemned as absolutely void" (referring to a case where judgment by default was taken with a plea on file). The court went so far as to say that while an equity court could have relieved the hardship, the law court could not; and that while the Supreme Court could have relieved while the time for appeal lasted, the trial court granting the judgment could not. This opinion continues further as follows:

> ". . . but, where a court has jurisdiction of the subject matter and of the parties, and renders a judgment at a term of court, it is

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[10] Alabama & Vicksburg Railway Co. v. Bolding, ibid.
[11] 167 Miss. 546, 145 So. 731 (1933).

> without power to set aside such judgment after the term of court has elapsed. See Sagory v. Bayless, 13 Smedes & M. 155; Barker v. Justice, 41 Miss. 240; Shirley v. Conway, 44 Miss. 434; Wiggle v. Owen, 45 Miss. 691; Lane v. Wheless, 46 Miss. 666; Beard v. McLain, 117 Miss. 316, 78 So. 184; Evans v. Kings-Peoples Auto Company, 135 Miss. 194, 99 So. 758; and Bates v. Strickland, 139 Miss. 639, 103 So. 432."[12]

In essence the Court further held that, even if the proof did show on a subsequent hearing at the succeeding term that a plea was on file, the Court adjudicated that none was on file and the proceedings were regular on their face and that the judgment contained "everything necessary to show jurisdiction of the court and proper rendition of the judgment."

In *Strain v. Gayden,*[13] it was held that so far as the principle of finality is concerned, the judgment taken by default is the same as any other judgment.

A case that should be read in close parallel with the case of *McIntosh v. Munson,*[14] is the more recent case of *Gardner v. Price.*[15] Default judgment was taken in the justice court and appeal taken to the circuit court where default judgment was again taken. The cause was appealed to the Supreme Court, where it was dismissed when it became apparent that the appeal from the justice court to the circuit court was taken too late. The case at that time was styled *Gardner v. Cade.*[16] The circuit court entertained a motion, upon remand, to dismiss the case and ordered its dismissal. To avoid execution from the judgment now back in the justice of the peace court, the defendants sought an injunction in the chancery court, which ultimately resulted in the dissolution of the injunction and dismissal of the suit. Upon appeal to the Supreme Court under the style above stated, *Gardner v. Price,* a divided court reversed the Chancellor and remanded the cause to the chancery court. The basis for the injunction suit was that the judgment had been fraudulently procured in the justice of the peace court and in violation of an agreement with the justice of the peace that the case would not be tried upon the date it came on for hearing, but would be continued on account of the prevalent custom in Humphrey's County whereby all justice of the peace cases were continued to the end of a circuit court term, which was then in session. In reversing the case, a majority of the Justices were persuaded by what is said to be one of the causes justifying a reversal after the expiration of the term—where the Judge of the court made certain statements which led the litigant or counsel to believe that the cause would not be tried at the current term. This principle of law is set forth in *Corpus Juris*.[17] The extended comment made concerning this case is justified by the belief, considered most significant, that the attack upon this judgment prevailed due to the fact that it was through the avenue of the equity court rather than the law court. In other words, following the parallel of *McIntosh v. Munson*[18] the chancery court did that which the law court could not and would not have done. Be that as it may, a very strong dissent was filed by Justice Roberds and was joined in by Chief Justice Smith. Justice Roberds said it was an attack upon the well-established rule of what he termed "the finality of judgments."

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[12] McIntosh v. Munson Road Machinery Co., ibid.
[13] 197 Miss. 353, 20 So.2d 697 (1945).
[14] McIntosh v. Munson Road Machinery Co., see note 11 supra.
[15] 199 Miss. 809, 25 So.2d 459 (1946).
[16] 190 Miss. 505, 200 So. 720 (1941).

It is apparent that a judgment will be reversed where the declaration states no cause of action. *Wilson v. Terry*,[19] a case originating in the Circuit Court of the First Judicial District of Hinds County, is a case in point. An amendment was made bringing in a defendant, the defendant who prosecuted the appeal. But the amendment failed to state a cause of action against him. It merely made him a "defendant". When default judgment was taken and a writ of inquiry requested, the court, relying upon the accuracy of the pleaders, made no personal examination of the declaration and amendment thereto to see if a cause of action was stated. After final judgment by default and writ of inquiry, the case was removed to the Supreme Court where the cause was reversed on account of the fact that no cause of action was charged against the defendant who appealed. It is true the case was remanded; however, there is some doubt that this case falls within the category of cases mentioned by Judge Campbell in *Alabama and Vicksburg Railway Company v. Bolding*,[20] wherein he stated that only the Supreme Court could relieve a judgment where the judgment was irregular but not pronounced void. Where the declaration states no cause of action, it appears logical that the Circuit Court of the First Judicial District of Hinds County, upon proper applicaton, might have set the judgment aside even after the expiration of the term at which it was rendered if the judgment was by default. However, the writer takes no stand thereto, but thinks it more appropriate to merely raise the question for consideration.

Attention should be called to the case of *Duvall v. Duvall*,[21] which is a suit in chancery for separate maintenance. In that decision it is said, "Where the court has jurisdiction of the parties and the subject matter, a judgment render on a complaint that does not state a good cause of action is not void and subject to collateral attack . . . ." This is a suit in chancery under the laws governing divorce, alimony and separate maintenance, and I do not believe it could be absolutely controlling as to the case quoted above, a suit at law where the declaration wholly fails to state any cause of action.

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[17] 34 C.J., Judgments § 518(c), p. 299.
[18] McIntosh v. Munson Road Machinery Co., see note 11 supra.
[19] 218 Miss. 411, 67 So.2d 387 (1953).
[20] Alabama & Vicksburg Railway Co. v. Bolding, see note 9 supra.
[21] 80 So. 2d 752 (Miss. 1955).

One of the most recent cases on the subject is the case of *Road Material and Equipment Co. v. Arch McGowan.*[22] In this cause the motion was made some four years after judgment was rendered in the Circuit Court of the First Judicial District of Hinds County to set aside a money judgment which had been entered in na replevin action. The circuit court set the judgment aside as being absolutely void on account of no power in the circuit court to render a money judgment in such action. The money judgment was taken by default in 1951 and was set aside upon motion in 1955. The opinion is rather exhaustive, many cases and texts being quoted therein. Under the sixth and seventh syllabus Judge Ethridge stated:

> "The Circuit Court had the power to later amend its 1951 judgment so as to remove therefrom the provisions awarding plaintiff a money judgment against defendant. This power exists as part of the inherent power of the court to correct invalid and void provisions in its judgments. The general rule is stated in 49 C. J. S., Judgments, Section 266, page 479, as follows: 'It has been held, without reference to the term or time at which the judgment was rendered, that the inherent power of a court to open or vacate its judgments may be exercised when the judgment is void, or when there has been a procedural or jurisdictional defect or where a question of fraud or other collateral issue is raised.' "

In the case of *Harper v. Barnett,*[23] Judge Whitfield said:

> "The court doubtless had the power, after the term, aside from Section 940, Code of 1892, to vacate the judgment on the ground that it was obtained by fraud or that 'the judgment as entered on the record of the court did not accord with that intended to have been entered.' "

The opinion further holds that what is termed a common law petition to vacate the judgment after the expiration of the term may be entertained and acted upon by the court where it is charged that there has been a "fraud upon the jurisdiction of the court." The opinion further holds that parol proof may be taken thereunder, whereas no parol proof may be taken under Section 940, Code of 1892, which is the section now numbered 1670 in the Code of 1942 pertinent to the correction of errors in judgments. In the *Barnett* case, although the court ruled as a general principle of law that such an action might be maintained, the relief was denied in the petition to the Supreme Court and the cause was reversed. The charge of fraud was that there was an agreement among counsel that the judgment in the case would go against the defendant, but that the bondsmen would be relieved.

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[22] 91 So. 2d 554 (Miss. 1956).
[23] 16 So. 533 (Miss. 1895).

In connection with this subject, it would be appropriate to make some mention of the writ of error coram nobis. The resort or attempted resort to this writ in the past has yielded little assistance to the applicants. Other than *Howie v. State,*[24] I have been unable to find any case wherein profit was derived therefrom by the applicant. By statute, coram nobis in its original form was removed from the criminal practice. A system was established by said act whereby the writ could not issue except upon authority from the Supreme Court. In *White v. State,*[25] the Court held that the writ of error coram nobis was not available to obtain a new trial on the ground of newly discovered evidence. In *Lott v. Illinois Central Railroad Company,*[26] Chief Justice Smith in referring to the relief sought by coram nobis stated:

> ". . . a relief which once could be granted only on the archaic writ of error coram nobis, which now can be granted in response to a simple motion or petition setting up the necessary facts."

In the *Lott* case, numerous cases in support of this pronouncement are cited.

As stated previously, the general rules set down in the commentaries with reference to the subject under discussion are, with some exceptions, fairly conformable to the judicial law of our state. For instance in *American Jurisprudence*[27] a distinction is made between default judgments and judgments resulting from a trial on the merits. No such distinction exists as recognized in our law when the proceeding has to do with setting aside of a judgment after the conclusion of the term of court.[28] However, the fact that the judgment is by default rather than trial on the merits is extremely persuasive when the question under consideration is the setting aside of a judgment during term time.

In this article the writer has placed emphasis upon the decisions or judicial law of our State. It is believed that the subject matter here under discussion presents a situation, often encountered in legal research, where the laws of other jurisdictions are not practically helpful.

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[24] 121 Miss. 197, 83 So. 158 (1919).
[25] 159 Miss. 207, 131 So. 96 (1930).
[26] 193 Miss. 443, 10 So. 2d 96 (1942).
[27] 30A Am. Jur., Judgments, § 632.
[28] Strain v. Gayden, see note 13 supra.

No effort has been made to carefully examine and report upon every case bearing upon the subject. Space, of course, would not permit this. An effort has been made to select those particular cases which it is believed cast the most light upon the subject, and from the consideration of which, each in conjunction with the other, some definite conclusions may be reached.

The commentaries contain a discussion of a wide range of things that would be efficient to set aside a judgment in a law court after the conclusion of the term. These consist of such subjects as perjury, collusion, duress, accident or surprise, unavoidable casualty or misfortune, mistake, etc. I find no case in our jurisprudence where any of these things, taken alone, would justify the setting aside of a law court judgment after the term is concluded. As previously stated, many states have special statutes dealing with this subject matter, but Mississippi does not.

The subject of fraud, as a general term, presents unusual difficulties in this connection. Both our decisions and the commentaries hold that fraud must be extrinsic and not intrinsic; that is, it must not be a matter drawn within the arena of the trial during its progress. It is the conclusion of this writer that after a careful consideration of the cases herein quoted and believed to be controlling over the subject matter in our jurisprudence, only fraud upon the jurisdiction of the court is efficient to render a judgment void, and therefore subject to be set aside.

In an article dealing with such a subject as is here under discussion, at the end thereof it should be possible to point to certain definite conclusions, practical in nature and comprehensive in understanding. The writer makes the following conclusions in the belief and hope that they are reasonably derivable from the composite of the judical law of the state as touching the subject under discussion:

A. That a court of law has absolute control over its judgments and proceedings during the term time and may change, alter or set aside the same within its discretion;

B. That after the expiration of the term at which the judgment was rendered the law court cannot open, vacate, modify or set aside its decisions unless, (1) the judgment is absolutely void for fraud on the jurisdiction of the court; (2) the rendition of said judgment was without and beyond the powers of the court to render; or, (3) the judgment was entered without process or notice served upon the defendant as required by due process of law.

C. That neither errors of fact or law, irregularities, inadvertence, mistake of law or fact or any other matter which would render the judgment voidable on appeal would be efficient to set the judgment aside.

D. That courts of chancery may relieve the hardships of the judgments of law courts under conditions where the law courts themselves cannot and will not do so.

CONCLUSION

The finality of judgments is an important element of our impersonal law; that is, the basic law upon which our government and society rest, the English and American jurisprudence and law of property and individual freedom. The oft-quoted phrase, "Ours is a government of laws and not of men" is but another way of stating that our laws are impersonal and constitute a self-subsisting functional entity. When the social philosophies encroach so far into the field of the law that we have judges who turn their back upon the sometimes considered hard strictures of the law and set about to do "the right thing," then we are truly departing from the fundamentals and are well upon the road to the loss of our basic property rights and freedom that have been wrought from a thousand years of travail by our Anglo-Saxon ancestors. Paradoxically enough, the judge who deserts the fundamentals of the law and seeks to do "the right thing" is a close forerunner of the tyrant.

EXTRAORDINARY AND SPECIAL STATUTORY ACTIONS

*Francis T. Zachary**

A. EJECTMENT

The possessory action of Ejectment is outlined in minute detail in the Code of 1942, and is contained in Chapter One of Title 7, beginning with Section 778.[1] Any complete discussion of the law of Ejectment would, of necessity, be too voluminous to be treated in an article of this nature. Therefore, this discussion shall be limited to the general meaning and application of the statutory action in Mississippi, together with a short review of its history, as well as a discussion of some of the problems of procedure which will be encountered in its use.

ORIGIN OR HISTORY

The possessory action of Ejectment, dealing with the recovery of possession of specific real property, is a creature of the law courts of England, and originally the action was to recover damages for the wrongful ejectment or ouster of one who held a lease or a term of years in a specific parcel of realty. At that time, damages only could be recovered, the measure of which was the mesne profits. However, in recent times, ejectment has become an effective remedy for the speedy trial of the right to possession of special real property, including freehold estates as well as terms for years, and in a great many jurisdictions ejectment is used to settle the title and establish the right to property.

SPECIFIC STATUTORY ACTION IN MISSISSIPPI

The action of ejectment in Mississippi is a statutory remedy,[2] and may be maintained in all cases where the plaintiff is legally entitled to possession of the land.[3] Originally ejectment was a purely possessory action, and, although some modern statutes have enlarged the scope of the action to include trial of the title and recovery of mesne profits and damages, it remains essentially a possessory action.[4]

Ejectment in Mississippi is not intended to be an abstract method of trying questions of title, although it is necessary to determine the title to the property, or at least to decide whether the plaintiff has a right of immediate entry or possession as against the particular defendants.[5] Section 825 of the Code of 1942, allows a plaintiff to recover mesne profits and damages in the action of ejectment; however this is optional, and he may bring a separate action to recover mesne profits after recovery in the ejectment suit.[6]

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[1] The Mississippi Supreme Court in Burns v. Allen, 202 Miss. 240, 31 So.2d 125 (1947) stated that this entire chapter was complete in itself and that all procedures there outlined must be followed in order to maintain this action for even in its abridged form it is sui generis.

[2] Burns v. Allen, note 1 supra.

[3] Miss. Code Ann. § 778 (1942).

[4] Gunter v. Viverett, 193 Miss. 206, 8 So.2d 247 (1942).

Mississippi is one of the few remaining jurisdictions which disguishes between law and equity, so it is important to observe that ejectment is cognizable at law and not in equity. At common law an equitable defense was not available in an action of ejectment;[7] however, our Supreme Court has held that where a defendant has sufficient equitable title to draw to it the legal title, the legal title in the plaintiff will not prevail.[8] The action is designed to enforce legal rights, and the plaintiff must have a legal right to the possession of the property described in his declaration. The only relief that may be granted him upon his pleadings is the possession of the property and possibly damages for its detention. There can be no abstract decision concerning the title, nor can equitable relief be granted in this action in Mississippi.

Comparing Statutes and Common Law

At common law, four elements were necessary to support an action in ejectment, namely: title, lease, entry and ouster.[9] However, our Statute has dispensed with the consent rule and all other fictions which were necessary in the common law action of ejectment.[10] The entry by the defendant and the ouster of the plaintiff are no longer prerequisites if it appears that the plaintiff has possessory title to the property and possession is withheld by the defendant; the proceedings are to be a trial of the title and not of an actual ouster unless it is necessary.[11] To recover possession of real property by means of ejectment, the plaintiff must have title with the present right of continued possession, with the right to maintain continued possession as well as the present right to possession.[12] But it was held in *Anderson v. Moore,*[13] that adverse possession gives the possessor and those in his chain of title sufficient legal title to recover in ejectment against a mere intruder who has no title. It has also been held that a mere right of way or easement does not authorize exclusive possession.[14]

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[5] Acoff v. Roman, 172 Miss. 181, 159 So. 555 (1935).

[6] Emrich v. Ireland, 55 Miss. 390 (1877); Miss. Code Ann. § 825 (1942).

[7] Morgan v. Blewitt, 72 Miss. 903, 17 So. 601 (1895).

[8] Hytken v. Bianca, 186 Miss. 323, 188 So. 311 (1939).

[9] 18 Am. Jur., Ejectment § 7.

[10] Miss. Code Ann. § 785 (1942).

[11] Miss. Code Ann. § 779 (1942).

[12] Griffin v. Sheffield, 38 Miss. 359 (1860); Wolfe v. Doe, 13 Sm. & M. 103 (Miss. 1849); Doe ex dem. Reynolds v. Ingersoll, 11 Sm. & M. 249 (Miss. 1848).

[13] 84 Miss. 400, 36 So. 520 (1904).

[14] Lott v. Paine, 82 Miss. 218, 33 So. 948 (1903).

Fortunately, this remedy is explained in such detail in the statutes[15] that it is the opinion of the writer that if the statutes are explicitly followed, there is little room for error.

In Mississippi, any person who is either an actual occupant or is claiming title and interest may be made a defendant; or if the premises are unoccupied, any person exercising any act of ownership or control or claiming any title or interest may be made a defendant.[16] Non-resident defendants may be joined in this action by process by publication, or in the event of death, any legal representative who is a non-resident may be joined in a like manner.[17] Tenants are required to give notice to landlords,[18] and all life tenants, reversioners or remaindermen have the right to be admitted to defend their right and title.[19] If a tenant does not notify his landloard of the ejectment proceeding, the tenant is liable for three years rent on the premises, which may be rocevered in a separate action at law.[20] A default judgment or surrender of the premises by the tenant does not prejudice the rights of any reversioner or remainderman.[21] Since all common law fictions and the consent rule have been abolished in Mississippi by statute,[22] the action is commenced by simply filing a declaration, the form for which is set forth in Section 790 of the Code of 1942, in the name of the person claiming the right to possession, with a sufficiently detailed description of the premises[23] as will distinctly apprise the defendant of the location of the property so that possession may be delivered to the claimant.[24] Furthermore, the plaintiff may claim only an undivided interest therein, but he must state this in his declaration.[25] If he claims more than that to which he is entitled and at the trial fails to show that he is entitled to possession of the whole, then he may recover that to which he has proved title.[26]

After the declaration is filed, a summons,[27] the form for which is set forth in Section 791 of the Code of 1942, will issue for the defendant in the same manner as in personal actions.[28] The normal plea of the defendant in the statutory action of ejectment is "Not Guilty," which, if filed within proper time and in the manner required for a personal action, will allow the defendant to introduce any evidence which constitutes a lawful defense to the action.[29] The defendant may also defend only a part of the premises, but if he does, this must be set forth in the plea.[30] If the plaintiff demands mesne profits, it is necessary for him to demand and specify the amount of money claimed for the use and occupation of the premises by the defendant from the date of the ouster.[31] Actions to recover mesne profits are governed by the six year statute of limitation.[32] The statutes set forth the form for all existing pleadings: a plea of a tenant defending the whole claim[33] or only a part;[34] the landlord defending separately from the tenant;[35] a plea by any other person than the landlord;[36] a plea by the landlord and tenant defending jointly;[37] and a plea by other than the landloard defending jointly with the tenant.[38] If the defendant desires to deny that he was, at the time the action was commenced, in possession of any part of the premises or that that he was exercising any act of ownership over the property or claiming any title thereto, or any interest therein, he may do so by a special plea.[39] A plea of the general issue and a special plea cannot be made, as to the land, in the same action and the court will cause one or the other to be stricken, as no issue can be presented while both pleas remain.[40] But if he files a special plea, the title of the plaintiff shall be admitted and the only question at the trial shall be in relation to the facts so specially pleaded.[41] Adverse possession of a part of the premises will not be considered as possession of the whole.[42] A plea of "Not Guilty" by the defendant for the purposes of this action is taken as an admission that he was in possession of the premises for which he defends at the time of the commencement of the action.[43] Judgment by default may be taken and a writ of possession issued thereupon with costs paid by the

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[15] Miss. Code Ann. §§ 778-830 (1942).

[16] Miss. Code Ann. § 780 (1942).

[17] Miss. Code Ann. § 781 (1942).

[18] Miss. Code § 782 (1942).

[19] Miss. Code Ann. § 783 (1942).

[20] See note 18 supra.

[21] Miss. Code Ann. § 784 (1942).

[22] Brewer v. Beckwith, 35 Miss. 467 (1858); Miss. Code Ann. § 785 (1942).

[23] Lum v. Reed, 53 Miss. 73 (1876); Lovejoy v. McDibben, 113 Miss. 369, 74 So. 281 (1917); Lazar v. Caston, 67 Miss. 275, 7 So. 321 (1889). The court held in this case that a description in the following form was insufficient: "North part of the southwest quarter of lot two."

[24] Miss. Code Ann. § 785 (1942).

[25] Ibid.

[26] See note 24 supra.

[27] Emmons v. Frazier, 221 Miss. 241, 72 So.2d 444 (1954); Burns v. Allen, 202 Miss. 240, 31 So.2d 125 (1947).

[28] Miss. Code Ann. § 786 (1942); Burns v. Allen, 202 Miss. 240, 31 So.2d 125 (1947). This case held that Section 786 of the Code of 1942 refers only to the manner of issue,

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execution and return of a summons and therefore does not impair the effect of Sections 789 and 791 of the Code of 1942.

[29] Bernard v. Elder, 50 Miss. 336 (1874); Miss. Code Ann. § 787 (1942).

[30] Miss. Code Ann. § 787 (1942).

[31] Miss. Code Ann. § 790 (1942).

[32] Dean v. Tucker, 58 Miss. 487 (1880).

[33] Miss. Code Ann. § 792 (1942).

[34] Miss. Code Ann. § 793 (1942).

[35] Miss. Code Ann. § 794 (1942).

[36] Miss. Code Ann. § 795 (1942).

[37] Miss. Code Ann. § 796 (1942).

[38] Miss. Code Ann. § 797 (1942).

[39] Bernard v. Elder, 50 Miss. 336 (1874); Miss. Code Ann. § 798 (1942).

[40] Powell v. Watson, 66 Miss. 176, 5 So. 513 (1888); Hutto v. Thornton, 44 Miss. 166 (1870); see also Town of Scranton v. Bosarge, 19 So. 194 (Miss. 1896).

[41] See note 39 supra.

[42] Ibid.

[43] Powell v. Watson, note 40 supra; Bernard v. Elder, note 39 supra; Miss. Code Ann. § 799 (1942).

defendant.[44] The plantiff may discontinue the action as to any or all of the defendants by making application to the court to that effect and by paying the costs.[45] In like manner, one of several defendants may retract his plea and thus admit the action of the plaintiff and if no other party defends for that portion, the plaintiff may have judgment entered for that portion.[46] It is interesting to note that although an abstract of title is not necessary for the filing of an action of ejectment, after issue is joined, either of the parties may demand, in writing, a bill of particulars of his opponent's claim or his specific title.[47] This bill of particulars usually contains an outline of the documentary evidence expected to be used and statements of the substance of any and all instruments which might be lost, and it shows how and where title is claimed.[48] The Mississippi Supreme Court has ruled that once a bill of particulars has been requested and filed, the parties are confined to those matters specified in their bill of particulars of title,[49] but the court may allow either party to amend his bill when good cause is shown.[50] If a party should fail to furnish a bill of particulars, after being duly and legally called upon therefor, then he should not be permitted to introduce evidence at the trial.[51]

Either party in an ejectment suit has the right to demand a survey and may apply to the clerk of the court to issue a commission for this purpose. Any surveyor may report the same under oath to the court after the opposite party has had five days notice at the time of making of the survey.[52] If it is pronounced that in the judgment of the court the survey was necessary in order to properly try the action, then the costs of the survey may be included in the court costs.[53]

Since ejectment is an unusual action, the death of either party does not abate the action, but it may be continued by those legally entitled to continue such action under the statute.[54] Our statutes set forth specifically what is to be done to revive a suit in all death situations. The situations are set forth in Sections 807 through 815 of the Code of 1942, and the cases there annotated. In the trial of the action of ejtctment, the burden of proof,[55] defenses,[56] admissibility and sufficiency of evidence,[57] and general procedures are substantially in accordance with the rules pertaining to other trials at law.

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[44] Decell v. McRee, 83 Miss. 423, 35 So. 940 (1904); Miss. Code Ann. § 800 (1942).

[45] Miss. Code Ann. § 802 (1942).

[46] Buie v. Clay, 127 Miss. 719, 90 So. 446 (1922); Miss. Code Ann. § 803 (1942).

[47] Miss. Code Ann. § 804 (1942).

[48] Mitchell v. Tubb, 107 Miss. 221, 65 So. 216 (1914).

[49] Smith v. Whittington, 112 Miss. 759, 73 So. 785 (1917); Goforth v. Stingily, 79 Miss. 398, 30 So. 690 (1901).

[50] Goforth v. Stingily, note 49 supra; Summers v. Brady, 56 Miss. 10 (1878).

[51] Early v. Long, 89 Miss. 285, 42 So. 348 (1878).

[52] Lenoir v. People's Bank, 87 Miss. 559, 40 So. 5 (1906); Cannon v. Yarbrough, 127 Miss. 186, 89 So. 911 (1921); Miss. Code Ann., § 805 (1942).

[53] Miss. Code Ann. § 805 (1942).

[54] Miss. Code Ann. § 806 (1942).

Questions concerning mesne profits[58] and compensation for improvements[59] are questions for the jury, and they may find the actual cash value of the improvements, taxes, mesne profits, etc., which findings the jury may set-off, one against the other, and announce accordingly in their verdict.[60] A judgment in an ejectment suit is res adjudicata as to the parties in the suit, but a person suffering under a disability at the time of judgment shall have three years, after removal of the disability, in which to commence an action.[61] A judgment rendered against a life tenant, however, does not bar an appeal by the reversioner or remaindermen during the tenant's life or after his death.[62]

The judgment in an ejectment suit, together with a certified copy of the declaration, the writ, the plea and answer, if any, and other papers in the suit may be recorded in the proper Land Deed Records in the county where the land is situated, and may be indexed as a deed from the unsuccessful party to the party who obtains the judgment.[63]

B. UNLAWFUL ENTRY AND DETAINER

The civil remedy for the recovery of the possession of premises, granted for the unlawful entry and detainer of real property, is of statutory origin and is covered by Sections 1033-1058 of the Code of 1942. The previously discussed subject of ejectment is an effective remedy for the speedy trial of the *right* to possession of specific real property, but the special statutory action of unlawful entry and detainer is the civil remedy for recovery of *possession of specific premises.* Orginally the common law conceded to any party with title to land and the legal right of entry thereon the right to use actual force to recover its possessions; therefore, the statutory action of unlawful entry and detainer was unnecessary.

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[55] Goforth v. Stingily, 79 Miss. 398, 30 So. 690 (1901); Archer v. Helms, 70 Miss. 874, 12 So. 702 (1893); Davis v. Davis, 68 Miss. 478, 10 So. 70 (1891).

[56] Larson v. Larson, 82 Miss. 116, 33 So. 717 (1903); Graham v. Warren, 81 Miss. 330, 33 So. 71 (1902); Sintes v. Barber, 78 Miss. 585, 29 So. 403 (1901); Bolton v. Roebuck, 77 Miss. 710, 27 So. 630 (1900).

[57] Maxwell v. Mississippi, 95 Miss. 466, 48 So. 610 (1909); Illinois Central R. Co. v. Baldwin, 77 Miss. 788, 28 So. 948 (1900).

[58] Emrich v. Ireland, 55 Miss. 390 (1877); Bell v. Medford, 57 Miss. 31 (1879); Pass v. McLendon, 62 Miss. 580 (1885).

[59] Demourelle v. Piazza, 77 Miss. 434, 27 So. 623 (1900); Pass v. McLendon, 62 Miss. 580 (1885); Johnson v. Futch, 57 Miss. 73 (1879); Gaines v. Kennedy, 53 Miss. 103 (1876).

[60] Miss. Code Ann. §§ 825, 826 (1942).

[61] Melsheimer v. McKnight, 92 Miss. 386, 46 So. 827 (1908); Miss. Code Ann. § 829 (1942).

[62] Miss. Code Ann. § 828 (1942).

[63] Miss. Code Ann. § 830 (1942).

This remedy was concurrent with such possessory actions as trespass, ejectment or assize of novel disseisin, and was available to any person disseised until his right of entry was tolled.[1]

The privilege of using force, allowed by the common law to persons turned out of possession, was found to be prejudicial to the public peace and welfare, for many persons used violent methods to reinstate themselves. Therefore at an early date there were statutes passed in England to restrain people from the use of these violent methods. The first was the Statute of 5 Richard II (1381).[2] Eventually, the Statute of 8 Henry VI afforded the aggrieved party a remedy by an indictment, by assize of novel disseisin, or by an action of trespass, to recover treble damages for any loss suffered by him. As previously stated, the purpose of these statutes was to discourage the original common law practice of using force and violence, which was considered to lead to breaches of the peace.

The fact that only naked possession is at issue in the action of unlawful entry and detainer distinguishes this form of action from ejectment, where the object is to try the title or right of entry.[3]

In order to sustain this action the plaintiff must prove: that the complainant was in actual and peaceful possession of the premises; and, that the defendant forcefully entered or turned him out of possession, or dispossessed him by force.[4] Our statute fails to mention the necessity for title, deeds, or that any facts need be shown concerning the plaintiff's right of possession. It merely states that anyone deprived of possession by force, intimidation, fraud, stratagem, stealth, etc. may maintain the action.[5] This action affords a speedy remedy to recover the possession of any land which was taken by force or is held over and detained from the person in actual peaceable possession thereof. Mississippi is one of the few jurisdictions that has provided, by special statute,[6] that a purchaser at a judical sale may maintain an action of unlawful entry and detainer to recover possession of the property purchased when the judgment was made. This action is restricted to recovering possession of real property for which a writ of entry might lie at common law or by statute, and is not available as a remedy for the purpose of recovering incorporeal

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[1] Page v. Dwight, 170 Mass. 29, 48 N. E. 850 (1897).

[2] 22 Am. Jur., Forcible Entry and Detainer § 3 (1955).

[3] McKay v. Shaffer, 202 Miss. 558, 32 So.2d 746 (1947); McCullum v. Gavin, 149 Miss. 885, 116 So. 94 (1928); Paden v. Gibbs, 88 Miss. 274, 40 So. 871 (1906); Clark v. Bourgeois, 86 Miss. 1, 38 So. 187 (1905).

[4] Martin v. Leslie, 229 Miss. 656, 91 So.2d 743 (1957); Tate v. Tate, 217 Miss. 734, 64 So.2d 908 (1953); Citizens' Bank v. Grisby, 170 Miss. 655, 155 So. 684 (1934); Owen v. Monroe County Alliance, 77 Miss. 500, 27 So. 383 (1900); Wolfe v. Angevine, 57 Miss. 767 (1880); Rabe v. Fyler, 10 Sm. & M. 440 (Miss. 1848); Miss. Code Ann. §§ 1033, 1049 (1942).

[5] Miss. Code Ann. §§ 1033, 1049 (1942).

[6] McKay v. Shaffer, 202 Miss. 558, 37 So.2d 746 (1947); James v. Shaffer, 202 Miss. 565, 32 So.2d 749 (1947); Crittenden v. Leavenworth, 62 Miss. 32 (1884); Miss. Code Ann. §§ 1034, 1050 (1942).

real property, but lies only to recover possession of tangible or corporeal real property.

The Remedy in Mississippi

The chapter of the Code of 1942, dealing with unlawful entry and detainer might at first glance cause some confusion since Sections 1049-1058 seem to be a duplication of Sections 1033-1048. This seeming duplication is due to the fact that, generally, Sections 1033-1048 of the Code of 1942 prescribe the procedure in a special justice of peace tribunal;[7] and Sections 1049-1058 of the Code of 1942 provides a county court remedy before the county judge. These sections[8] provide that this remedy is available to anyone deprived of the possesson of land by force,[9] intimidation, fraud,[10] stratagem or stealth; and any landlord,[11] vendee, vendor,[12] mortgagee, trustee, cestui que trust or other person against whom the possession of land is withheld by his tenant, vendor, vendee, mortgagor, grantor or other person, after the expiration of his right by contract, express or implied, to hold possession, and the legal representatives or assigns of him who is so deprived of possession, or from whom possession is so withheld, as against him who so obtained possession, or withheld possession after expiration of his right, and all persons claiming to hold under him, shall, at any time within one year after such deprivation or withholding of possession, be entitled to the summary remedy of unlawful entry and detainer.[13]

The purchaser of land at a tax sale, or his vendee, after two years from the date of the sale, and within three years therefrom, may bring this action for the recovery of possession of the land, and by statute the judgment rendered in the cause is a bar to any action in any court brought after one year from the date of the judgment.[14]

The statute specifies the form to be used for the complaint[15] and the form for the warrant[16] to be issued. The complaint and warrant must set forth that the complainant has been unlawfully turned out or is unlawfully withheld from the possession of his premises.[17] The land sued for must be described with sufficient accuracy to enable an officer to remove the defendant therefrom, should the judgment be for the plaintiff, without going outside the record to determine the location of the land.[18]

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[7] Miss. Code Ann. § 1041 (1942).

[8] Miss. Code Ann. §§ 1033, 1049 (1942).

[9] Seals v. Williams, 80 Miss. 234, 31 So. 707 (1902).

[10] Clarks v. Bourgeois, supra note 3.

[11] Rabe v. Fyler, supra note 4.

[12] Bowling v. Bowling, 47 So. 802 (Miss. 1908).

[13] Miss. Code Ann. §§ 1033, 1049 (1942).

[14] Foote v. Dismukes, 71 Miss. 110, 13 So. 879 (1893); Crittenden v. Leavenworth, 62 Miss. 32 (1884); Miss. Code Ann. §§ 1034, 1050 (1942).

[15] Miss. Code Ann. § 1035 (1942), for special justice tribunals; Miss. Code Ann. § 1051 (1942), for county courts.

[16] Brown v. Ashford, 56 Miss. 677 (1879). Miss. Code Ann. § 1036 (1942), for special justice tribunals; Miss. Code Ann. § 1052 (1942), for county courts.

[17] Brown v. Ashford, 56 Miss. 677 (1879).

The statute concerning the special justice tribunal[19] provides that the warrant shall be made returnable to a certain day, not less than five days nor more than twenty days after the date of the warrant. There are also provisions which allow witnesses to be subpoenaed by the justice before whom the warrant was signed[20] and in cases where a witness is unable to be present in court, a deposition may be taken as in other cases before a justice of the peace.[21] Section 1041 of the Code of 1942 sets up a justice tribunal consisting of the justice issuing the warrant and two others of the county. They shall have the power to issue all proper process to bring witnesses before them and may adjourn from day to day until the trial is ended. This tribunal is considered a court of record. However, when the court issues final judgment, it is dissolved and has no power to grant a new trial.[22] A mayor of a municipality, being an ex officio justice of the peace within the territorial limits of the municipality, can serve on the tribunal.[23]

The constitutionality of this court was upheld in *Rabe v. Fyler*[24] as a special court established under the power conferred on the Legislative to establish such "inferior courts as may be necessary." If the defendant appears before the justice issuing the warrant and consents to a postponement of the trial, it may be later heard on the date set before the justice issuing the warrant and another, and the judgment will be valid, if the defendant does not object.[25] If the two justices disagree, the opinion of the justice before whom the complaint was made shall be the judgment of the court.[26] The plaintiff may recover rent in arrears and reasonable compensation for the use and occupation of the premises.[27] The Supreme Court held in *Ellison v. Landry,*[28] that under Sections 1043 and 947 of the Code of 1942 double rent may be recovered in an unlawful entry and detainer action if the plaintiff has given the defendant notice to quit.[29]

If the judgment is for the plaintiff in an action of unlawful entry and detainer and there are growing crops on the land, the defendant has a reasonable time to harvest such crops and has the right to enter on the land to give the crops necessary cultivation, provided he pays the plaintiff a reasonable compensation for the use of the land.[30]

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[18] Paden v. Gibbs, 88 Miss. 274, 40 So. 871 (1906).
[19] Miss. Code Ann. § 1038 (1942).
[20] Miss. Code Ann. § 1039 (1942).
[21] Miss. Code Ann. § 1040 (1942).
[22] Warren v. African Baptist Church, 50 Miss. 223 (1874).
[23] Nickles v. Kendricks, 73 Miss. 711, 19 So. 582 (1896).
[24] 10 Sm. & M. 440 (Miss. 1848).
[25] McLemore v. Scales, 68 Miss. 47, 8 So. 844 (1891).
[26] Miss. Code Ann. § 1047 (1942).
[27] Miss. Code Ann. § 1043 (1942).
[28] 199 Miss. 161, 24 So.2d 319 (1946).
[29] McKay v. Shaffer, supra note 3.

If there is a judgment for the plaintiff, the judgment shall read that he shall recover possession of the land with his costs and the judgment shall award a writ of habere facias possessionem, providing, however, that the writ or execution shall not issue within five days of the date of the judgment.[31] If the judgment be for the defendant, the complaint of the plaintiff shall be dismissed and the defendant shall recover his full costs.[32] A judgment of the justice tribunal or of the county court shall not be a bar to an action in the circuit court between the same parties concerning the same land and their findings of fact will not be taken as conclusive.[33]

Because the justice tribunals and county courts have concurrent jurisdiction over unlawful entry and detainer actions, it would seem proper to point out the differences which exist between these two courts. The requirements for maintenance of this action are the same in the county court as they are before a justice tribunal,[34] however, the warrant issuing from the county court must be made returnable not more than ten days nor less than five days from its date of issue, whereas it must be made returnable not more than twenty days nor less than five before the justice tribunal.[35]

It should be noted that this is a summary proceeding in both the justice tribunal and in the county court;[36] thus dispensing with the necessity of a jury. This feature makes the action of unlawful entry and detainer a speedy remedy for the recovery of possession of property.

C. EMINENT DOMAIN

Definition and Characteristics

Eminent domain,[1] the power of a sovereign state to take or to authorize the taking of any property within its jursdiction for the public use without the owner's consent, is an inherent, essential political right of all government even in its most primitive form. The power does not depend for its existence upon a specific grant in the Constitution, but instead exists in a sovereign state, founded upon the law of necessity.[2] The provisions found in most state constitutions relating to the taking of property for public use do not by implication grant the power to the government of the state, but limit a power which would otherwise be without limit.[3] The power embraces all cases where, by authority of the state and for the public good, the property of the individual is taken without his consent to be devoted to some particular use, by the state itself, a corporation, public or private, or by a private citizen for the welfare of the public.[4]

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[30] Miss. Code Ann. § 1045 (1942), for justice tribunal; Miss. Code Ann. § 1056 (1942), for county court.

[31] Miss. Code Ann., § 1044 (1942), for justice tribunal; Miss. Code Ann. § 1055 (1942), for county court.

[32] Miss. Code Ann. § 1047 (1942), for justice tribunal; Miss. Code Ann. § 1057 (1942), for county court.

[33] Miss. Code Ann. § 1048 (1942), for justice tribunals; Miss. Code Ann. § 1058 (1942), for county court.

[34] Miss. Code Ann. §§ 1033, 1049 (1942).

[35] Miss. Code Ann. §§ 1036, 1052 (1942).

[36] Miss. Code Ann. §§ 1033, 1049 (1942).

[1] Black, Law Dictionary (4th ed. 1951) defines eminent domain as "the power of the state to take private property for public use."

The exercise of this power of eminent domain is subject to all the prohibitions found in the Constitutions of the United States and of the several states. The provisions by which the power is chiefly limited are: (1) that property shall not be taken for public use without just compensation, and (2) that no person shall be deprived of his life, liberty or property without due process of law. The first of these provisions, contained in the Fifth Amendment to the Constitution of the United States, is considered to have been intended especially to govern the exercise of the power of eminent domain and is applied to that power more literally than to the other branches of sovereign authority. Since this amendment does not, however, restrict the powers of the states, but is a limitation on the powers of the Federal Government only, it is not applicable to the states except insofar as it is designed for their security against Federal power. The Mississippi Constitution contains a similar provision,[5] which is construed as a restrictive clause[6] and is binding on Mississippi state agencies.

The requirement of due process of law, found in both the Constitution of the United States[7] and the Mississippi Constitution,[8] is of general restrictive application and the power of eminent domain is within its purview. Since the due process clause of the Fourteenth Amendment to the United States Constitution operates as a restriction on the states, there is a possibility of a Federal question in every taking of property by eminent domain under state authority, even if all the requirements of the state constitution are met The due process clauses, in addition to requiring that the taking be for the public use and that just compensation be given, protect the landowner from the adoption of any form of procedure in eminent domain cases which deprives him of a reasonable opportunity to be heard or to present such objections and claims as he may be entitled to make.[9]

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[2] The right of eminent domain always has been a right at common law; it is not a right in equity, nor is it even a creature of statute. Kohl v. U. S., 91 U. S. 367 (1875). The right of eminent domain is an inherent and essential element of sovereignty and therefore would exist without any constitutional recognition. Brown v. Beatty, 34 Miss. 227 (1857).

[3] Erwin v. Miss. State Highway Comm., 213 Miss. 885, 58 So.2d 52 (1952); 18 Am. Jur., Eminent Domain § 7.

[4] 18 Am. Jur., Eminent Domain § 2.

[5] Miss. Const., Art. 3, § 17 (1890).

[6] Brown v. Beatty, supra note 2.

[7] U. S. Const., Fifth Amendment; U. S. Const., Fourteenth Amendment. The due process clause of the Fifth Amendment operates as a restriction on the Federal government, while the due process clause of the Fourteenth Amendment is a restriction on the states.

[8] Miss. Const., Art. 3, § 14 (1890).

Under the customary division of governmental power, the right to authorize the exercise of the eminent domain power is wholly legislative and there can be no taking of private property for public use against the will of the owner without the direct authority of the legislature. The procedure by which the power of eminent domain may be exercised rests with the legislature subject to the restrictive requirements of the constitutions.[10] The power is inalienable and no legislature can bind itself or its successors not to exercise this power when public necessity and convenience require it.[11]

Mississippi Statutes

The procedure for the exercise of the power of eminent domain in the State of Mississippi is covered mainly in Sections 2749-2782 of the Code of 1942. These sections set forth in detail the steps to be followed by any person or corporation having the right to condemn private property for public use.[12]

A special court of eminent domain is created, to consist of a justice of the peace and a jury,[13] upon the written application of any person or corporation having the authority and desire to exercise the power. The application shall be filed with the clerk of the circuit court of the county in which the property is situated, who shall indorse thereon his appointment of a competent justice of the peace to constitute, with a jury, the special court of eminent domain. The application shall make the owners of the property sought to be condemned, mortgagees, trustees or other persons having an interest therein or a lien thereon defendants thereto, and shall state with certainty the right and describe the property sought to be condemned.[14] The special court is then organized according to the Code provisions;[15] and, where the application seeks to condemn the property of more than one defendant, a separate trial shall be had for each. The justice of the peace shall not, for any cause, quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation. Evidence may be introduced by either party before the jury, under the direction of the justice, and the jury shall, unless the parties consent to the contrary, go to the premises and view the property sought to be condemned and its surroundings and may examine and measure the same, after which, either party may, by himself or counsel, or both, argue the cause.[16] It is mandatory that the justice of the peace, acting ministerially rather than judicially in presiding over the special eminent domain court,[17] give an instruction[18] in favor of defendant in the condemnation proceedings.[19] The jury shall give a verdict[20] specifying the exact amount of damages[21] to which the defendant is entitled, based upon their honest estimation according to the evidence adduced in the trial. The jury is the sole judge of the weight and credibility of the evidence. Judgment shall then be entered by the court in accordance with the jury's verdict.[22] Upon the return of the verdict and entry of the judgment, if the applicant pays the defendant the compensation fixed by the judgment, or tenders to him the amount of the judgment and pays the costs, he shall have the right to enter upon and take possession of the property of such defendant so condemned, and to appropriate the same to the public use defined in the application.[23]

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[9] Dohany v. Rogers, 281 U.S. 362 (1930); Whelan v. Johnston, 192 Miss. 673, 6 So.2d 300 (1942).

[10] Whelan v. Johnson, supra note 9.

[11] Georgia v. Chattanooga 264 U. S. 472 (1942); 18 Am. Jur., Eminent Domain § 7.

[12] The right of eminent domain is limited to the express terms or necessary implications of the statute. Wise v. Yazoo City, 96 Miss. 507, 51 So. 453 (1910). The power of eminent domain is in derogation of the common law and should be construed favorably to the owner as against the condemner, which rule applies to the quantum of interest to be taken as well as to the extent of the power vested in the condemner. Nicholson v. Board of Miss. Levee Commissionrs, 203 Miss. 71, 33 So.2d 604 (1947).

[13] Miss. Code Ann. § 2750 (1942).

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[14] Miss. Code Ann. § 2751 (1942). Condemner must determine at his peril the names of the owner and other persons having an interest in or lien on the premises sought to be condemned. Miss. State Highway Comm. v. West, 181 Miss. 206, 179 So. 279 (1938).

[15] Miss. Code Ann. §§ 2752-2758 (1942). When an issue is ready for trial, a jury of twelve men will be organized. No irregularity in drawing, summoning or impaneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after a verdict by the jury.

[16] Miss. Code Ann. § 2759 (1942). Burden of proof is on condemner on issue of damages or compensation to be allowed the owner. Miss. State Highway Comm. v. Treas., 197 Miss. 670, 20 So.2d 475 (1945).

[17] Sullivan v. Yazoo and Miss. Valley R. Co., 85 Miss. 649, 39 So. 33 (1904).

[18] Miss. Code Ann. § 2760 (1942).

[19] Any trial court, other than special eminent domain court, is not restricted to a particular instruction and formula when charging the jury as to what is "due compensation." Miss. State Highway Comm. v. Hillman, 189 Miss. 850, 198 So. 565 (1940).

[20] Miss. Code Ann. § 2761 (1942).

[21] The value of the land taken plus the damage, if any, to the remainder of the tract, testing by the comparative value before and after such taking, is the correct rule for ascertaining the entire damage. Miss. State Highway Comm. v. Burwell, 206 Miss. 490, 30 So.2d 497 (1949).

[22] Miss. Code Ann. § 2762 (1942).

[23] Miss. Code Ann. § 2763 (1942). As to all parties right to resort to eminent domain proceedings, appropriator has no right to enter upon and appropriate land of private owner until institution of eminent domain proceedings and prosecution thereof to judgment and payment in cash of amount adjudged as compensation. Miss. State Highway Comm. v. Buchanan, 175 Miss. 157, 165 So. 795 (1936).

Every party shall have the right to appeal to the circuit court from the finding of the jury in the special court by executing a bond with sufficient sureties payable to his adversary, in the amount of three hundred dollars.[24] If the appeal is made by the defendant, it shall not operate as a supersedeas, nor shall the right of the applicant to enter upon the land of the defendant and to appropriate the same to public use be delayed.[25] If appeal is taken by an applicant other than the State of Mississippi or any political subdivision thereof, and it should desire to enter upon and take possession of the property sought to be condemned pending further litigation, it may do so at any time after the return of the verdict by depositing with the clerk of the circuit court a sum equal to double the amount of the verdict.[26] Upon appeal, the issue shall be tried de novo in the circuit court, which shall try and dispose of it as other issues, and enter all proper judgments.[27]

The legal remedy by writ of prohibition is made applicable for the purpose of testing the questions of (1) whether the applicant seeking to exercise the right of eminent domain is entitled to the right, and/or (2) whether there is a public necessity for the taking of the particular property or a part thereof.[28] All the provisions in the chapter on quo warranto,[29] shall apply to the procedure under Section 2782; and the petition for the writ may be filed by any defendant in the condemnation proceedings. Upon the filing of a petition under this section, the circuit judge shall issue a temporary order staying the hearing in the court of eminent domain until the cause can be tried by the circuit judge, and if on the hearing the petition be sustained, a permanent writ of prohibition shall issue. An appeal may be taken to the Supreme Court as in other cases, but if the judgment of the circuit judge is to deny the petition, the appeal aforesaid shall not operate as a supersedeas, and the court of eminent domain may nevertheless proceed.[30] Section 2782 establishes the exclusive remedy and tribunal for determining the question of public necessity, and in the absence of fraud or manifest abuse of the condemning agency's discretion, the grant of power under this section excludes the implication of an analogous power in the chancery court.[31]

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[24] Miss. Code Ann. § 2766 (1942).

[25] See note 24 supra.

[26] See note 24 supra.

[27] Appeals from special eminent domain courts should be brought to circuit court and there tried de novo. Hattiesburg v. Pritchett, 160 Miss. 142, 179 So. 279 (1931).

[28] Miss. Code Ann. § 2782 (1942). This statute is the exclusive authority for a writ of prohibition restraining a condemnation proceeding, except in cases of a want of jurisdiction in the eminent domain court. Dantzler v. Miss. State Highway Comm., 187 Miss. 721, 193 So. 4 (1940).

[29] Miss. Code Ann. §§ 1120-1145 (1942).

[30] A landowner's petition for a writ of prohibition, which has been denied by the circuit judge, avails him nothing on appeal unless the Supreme Court should reverse the judgment appealed from before final judgment in the eminent domain court. Dantzler v. Miss. State Highway Comm., supra note 28.

The County Court Act[32] now gives exclusively to the county court the jurisdiction heretofore exercised by justices of the peace in special eminent domain proceedings in all instances where there is a county court in existence in the county wherein the property is located.[33] The rules of pleading, practice and procedure to be followed in the county courts shall be the same as those governing a special court of eminent domain,[34] except that all pleadings in the county court shall be in writing, and the jury shall be instructed by the judge in the manner now provided by law for instructing the jury in the circuit courts.[35]

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[31] Erwin v. Miss. State Highway Comm., supra note 3. But see Culley v. Pearl River Industrial Comm., 108 So.2d 390 (Miss. 1959), wherein the Miss. Supreme Court decided the question of public use without any previous proceedings in court of eminent domain and without a petition for a writ of prohibition being filed under Section 2782.

[32] Miss. Code Ann. § 1604 (1942). The County Court Act did not repeal the entire domain chapter, but both must be construed together, and all provisions of each not repugnant to provisions of the other must stand, but in case of repugnancy the county court chapter controls. Miss. State Highway Dept. v. Haines, 162 Miss. 216, 139 So. 168 (1932).

[33] Miss. State Highway Dept. v. Haines, supra note 32.

[34] Miss. Code Ann. § 1607 (1942). An appeal from county court to circuit court in eminent domain proceedings is on the record made in county court, and if there is no error the judgment will be affirmed, but if there is error there must be a trial de novo in the circuit court. Miss. State Highway Comm. v. Reddoch, 184 Miss. 302, 186 So. 298 (1939).

[35] Miss. Code Ann. § 1607 (1942).

APPEALS FROM: (A) MAYOR AND ALDERMEN; (B) BOARD OF SUPERVISORS; (C) PUBLIC SERVICE COMMISSION; (D) MISSISSIPPI EMPLOYMENT SECURITY COMMISSION; (E) OIL AND GAS BOARD

*William J. Gunn, Jr.**

The purpose of this article is to give a general discussion of appeals from the various boards and commission enumerated above. As most of these appeals are controlled by specific statutes, which will be hereinafter referred to, it becomes immediately apparent that strict compliance with the statutory requirements as to time, method, and manner of taking an appeal is a necessity. Two methods of review have come into general use in the development of the English judicial system. Either the case is heard de novo in an appellate court or the case is heard upon claimed errors and the result is to affirm, modify or reverse the judgment of the lower court. One is, in effect, a new trial, while the other passes merely upon the alleged errors in the lower court. In most American jurisdictions the two have been combined in varying degrees and the modern statutory appeal seems to partake of the nature of both of these fundamental methods. In any event, it is generally agreed that the term "appeal" is sometimes a word with a very indefinite meaning. In this discussion reference will be made to the controlling statutes and an analysis made of some of the governing principles enunciated by our courts.

A. MAYOR AND ALDERMEN

Our general statute[1] governing appeals of this type from judgments or decisions of municipal authorities provides that any person aggrieved thereby may appeal within ten days from the date of adjournment of the session in which such judgment or decision was rendered. The facts, judgment and decision may be embodied in a bill of exceptions which shall be signed by the person acting as president of the board; the clerk shall transmit the bill of exceptions to the circuit court on or before the first day of the next succeeding term, or at once if the court be in session; and the court shall hear and determine the case as presented by the bill of exceptions as an appellate court and shall affirm or reverse the judgment. In the event the judgment is reversed, it is the duty of the circuit court to render such judgment as the municipal authorities should have rendered and certify and return the same to the municipal authorities with costs awarded as in other cases. The statute further authorizes the employment of counsel to defend such appeals and authorizes payment thereof out of the municipal treasury.

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*Circuit Judge, Tenth Judicial District, Meridian, Mississippi.

[1] Miss. Code Ann. § 1195 (1942).

When the bill of exceptions is duly presented, it is the duty of the presiding officer to sign it.[2] In the event of refusal to sign by the presiding officer, it appears that mandamus would be the proper remedy and not the procedure under Section 1534 of the Code of 1942 wherein the signing of a bill of exceptions is authorized by the attorney when a judge refuses to sign. This conclusion is based on a case that involved this same section, in which it was held that Section 1534 did not apply.[3] The bill of exceptions must ordinarily be signed during the term of the municipal board in which the order complained of was passed, and where the time is not extended, the presiding officer is correct in refusing to sign a bill after adjournment.[4] However, where a bill is duly prepared and presented during the term, the exceptor will not be prejudiced because of failure of the presiding officer to sign it during the term.[5]

Though not specifically in point, it is appropriate in passing to mention several instances wherein jurisdiction of matters of objection to or appeal from actions of municipal authorities is vested in the chancery, rather than the circuit court. Among these are objections to matters relating to the issuance and sale of bonds by municipal authorities[6] and action of municipal authorities in extending or contracting corporate boundaries.[7]

When the matter is considered on appeal, the circuit court is limited to a consideration of the facts as embodied in the bill of exceptions, and oral testimony cannot be heard by agreement of the parties, even when confined to witnesses examined before the municipal authorities.[8] However, where a claim is rejected or disallowed by municipal authorities, the claimant is not limited to the procedure of appealing therefrom and embodying his claim and the facts with reference thereto in a bill of exceptions, but may institute suit directly against the municipality as was done in *Pyland v. Purvis.*[9]

As to appeals from the assessment of taxes, another statutory remedy is provided.[10] In such a case the trial or controversy is heard de novo in the circuit court.

Another procedure is provided in the matter of appeals from convictions of criminal offenses where violations of municipal ordinances are involved.[11]

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[2] Polk v. Hattiesburg, 109 Miss. 872, 69 So. 675 (1915).

[3] Roach v. Tallahatchie County, 78 Miss. 303, 29 So. 93 (1901).

[4] Hathorn v. Morgan, 107 Miss. 589, 65 So. 643 (1914).

[5] McGee v. Beall, 63 Miss. 455 (1886).

[6] Miss. Code Ann. § 1195 (1942).

[7] Miss. Code Ann. § 3374-10 (1942). (Code Section 3374-32 places jurisdiction of these matters in the chancery court even though a different procedure is provided for in the charter of such municipality).

[8] Greenwood v. Henderson, 84 Miss. 802, 37 So. 745 (1905).

[9] 87 Miss. 433, 40 So. 7 (1906).

[10] Miss. Code Ann. § 1196 (1942).

B. BOARD OF SUPERVISORS

The same general statute hereinabove discussed covers appeals from a Board of Supervisors.[12] It follows that the same principles with reference to time, method and manner of taking such an appeal applies, and the procedure followed is much the same in regard to the bill of exceptions, the hearing thereof and the affirmance or reversal of the Board when appeals are taken under this section.

With reference to the matter of claims against a county, it is provided in Section 2932 of the Code of 1942 that any person having such a claim which has been rejected in whole or in part by the Board of Supervisors may appeal to the circuit court, or such appeal may also lie if a Board refuses, when requested at a proper time, to pass finally thereon. In the alternative, claimant is authorized hereunder to bring suit against a county. It has been held that one cannot sue a county unless his claim has first been presented to and rejected by the Board of Supervisors.[13] Such fact of presentment and disallowance must be affirmatively alleged in such a suit,[14] but it is unnecessary to show an order on the minutes of the Board rejecting the same since it has been held that the disallowance may rest in parol.[15] Our court has also said that this section applies to all claims against the county whether based on tort or contract.[16] Of course, the right to sue the county is regulated by our Constitution and statutes.

In *Lafayette County v. Jones*[17] it was contended that Section 2932 of the Code of 1942 was the only statute authorizing an appeal from the disallowance of a claim by the Board of Supervisors, but the Court rejected the contention since Section 1195, Code of 1942, was the general statute providing for such an appeal. Where a claim is presented to the county and allowed only in part by the Board and an appeal is not taken during the statutory time, such action becomes final.[18] In the case above referred to, the Court held that the judgment of the Board for forty dollars (which was only part of the claim filed) was a judgment against the county for that amount, and, inasmuch as it was not appealed from, it was final and binding on the county; consequently, no right existed to sue the county for a portion of the claim which the Board disallowed. It has also been held that where a matter has been rejected by the Board and the time for an appeal therefrom has passed, the same matter cannot again be presented to the Board—the first adjudication rendering the matter res adjudicata.[19] Apparently, where claims are completely disallowed, the remedy of claimant may either be by way of appeal to the circuit court or by suit against the county. On the other hand, where a claim is allowed in part and rejected in part, the question arises under the holding of *Lafayette County v. Jones* as to whether or not an appeal to the circuit court under Section 1195 of the Code becomes the only remedy of claimant. It appears that the answer to this question is in the affirmative.

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[11] Miss. Code Ann. §§ 1202, 1203, 1205 (1942).
[12] Miss. Code Ann. § 1195 (1942).
[13] Lawrence County v. Brookhaven, 51 Miss. 68 (1875).
[14] Covington County v. Morris, 122 Miss. 495, 84 So. 462 (1920).
[15] Simpson County v. Kelly, 175 Miss. 596, 166 So. 532 (1936).
[16] Davis v. Lamar County, 107 Miss. 827, 66 So. 210 (1914).
[17] 199 Miss. 373, 25 So.2d 844 (1946).
[18] George County v. Bufkin, 117 Miss. 844, 78 So. 781 (1918).

Another type of appeal of importance from a Board of Supervisors is an appeal from the assessment of taxes, and the statute governing this type of appeal is Section 1196, Code of 1942. This Section provides that any person aggrieved by a decision of the Board as to the assessment of taxes may, within ten days after adjournment of the meeting at which such decision was made, appeal to the circuit court upon giving bond as therein specified, whereupon the clerk of the Board makes a copy of any papers relating to the controversy and files such papers and the bond with the clerk of the circuit court on or before its next term. The matter is tried anew in the circuit court at the first term as a preference case, and if decided against the person appealing, judgment is rendered on the appeal bond with damages at the rate of 10 per cent on the amount in controversy and all costs. If the matter is decided in favor of the person appealing, judgment in his favor is entered and certified to the Board of Supervisors, and it becomes the Board's duty to conform thereto and to pay the costs. The other pertinent part of the statute is as follows:

> "The County attorney, the district attorney, or the attorney general, if the state, county or municipality be aggrieved by a decision of the board of supervisors or the municipal authorities of a city, town, or village as to the assessment of taxes, may, within twenty days after the adjournment of the meeting at which such decision is made, or within twenty days after the adjournment of the meeting at which the assessment rolls are corrected in accordance with the instructions of the state tax commission, or within twenty days after the adjournment of the meeting of the board of supervisors at which the approval of the roll by the state tax commission is entered, appeal to the circuit court of the county in like manner as in the case of any person aggrieved as hereinbefore provided, except no bond shall be required, and such appeal may be otherwise governed by the provisions of this section."

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[19] Robinson v. Itawamba County, 107 Miss. 352, 65 So. 461 (1914).

The Board of Supervisors in performing its duties as fiscal agent of the county and in its assessing duties, acts pursuant to statute, and the assessment process must be substantially followed. For a discussion of some of the important principles governing the assessing process and appeals therefrom, reference is here made to an excellent article by one having long experience in such matters.[20] One pertinent comment from the above article is worthy of re-emphasis on every occasion:

> "There are probably more attorneys who appear before boards of supervisors in cases of assessments of property than on any other matter. If they represent a bank, corporation or any other taxpayer, they should study the statutory scheme involved, and the decisions of the Supreme Court of Mississippi construing these statutes before they file objections to the particular assessment involved."

The above statement regarding knowledge of how, when and whether to appeal applies with equal force to the entire subject of appeals herein discussed.

C. PUBLIC SERVICE COMMISSION

Sweeping changes were made in the powers, duties and functions of the Mississippi Public Service Commission in 1956 by legislative enactment regarding the authority and manner of regulating public utilities in this state.[21] This important legislation, in addition to many other changes, changed the appeal procedure from the Commission. Generally, the Commission has the power: to prescribe reasonable rules and regulations in order to carry out the provisions of the Act;[22] to entertain exclusive original jurisdiction over the intrastate business and property of public utilities with certain exceptions;[23] to conduct hearings[24] and to make and file findings and orders which are supported by substantial evidence presented in the hearings;[25] to rescind or amend any order or decision made by it[26] after notice and opportunity to be heard is given.[27] A full and complete record is kept of all proceedings before the Commission, or any Commissioner, or any formal hearing, and all testimony is taken down by a reporter appointed by the Commission.[28]

After an order or decision has been made by the Commission, any party to the proceedings, may, within thirty days after the entry of the order or decision, apply for a re-hearing in respect to any matter determined in said proceedings and specified in the application for rehearing. The Commission may grant and hold a re-hearing on any matter. The filing of an application for re-hearing does not stay or suspend the effective date of any Commission order or the obligation of any person to comply with such order unless the Commission, in its discretion, stays, suspends, or modifies such order. However, any party to the proceedings is entitled to a stay of the order, as a matter of right, upon filing with the Commission a bond payable to the State of Mississippi in such an amount and with sufficient surety (both as determined by the Commission) to insure the prompt payment of any damages or refunds to the party or persons entitled thereto, if the order shall at the conclusion of any subsequent proceedings become effective. Within twenty days after the application for such re-hearing, the Commission either grants or refuses the same, and a failure to act thereon is deemed a refusal. If the application is granted, the Commission enters a new order after the re-hearing which becomes effective ten days after entry, unless otherwise provided by the Commission for reasonable cause.[29]

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[20] Johnson, Legal Principles Governing County Boards of Supervisors, 21 Miss. L.J. 340 (1950).

[21] Miss. Code Ann. § 7716-01 (1942).

[22] Miss. Code Ann. § 7716-23 (1942).

[23] Miss. Code Ann. § 7716-04 (1942).

[24] Miss. Code Ann. §§ 7705 and 7716-11 (1942).

[25] Miss. Code Ann. § 7716-22 (1942).

[26] Miss. Code Ann. § 7716-23 (1942).

[27] Miss. Code Ann. § 7716-14 (1942).

[28] Miss. Code Ann. § 7716-24 (1942).

All Commission matters appealed to any court take preference over other cases as a matter affecting the public interest, thus all courts are required to docket and dispose of such cases at the earliest moment compatible with the ends of justice.[30] In all actions and proceedings arising out of the exercise of the authority and powers granted to the Commission, the burden of proof is on the party seeking to vacate an order of the Commission.[31]

> The general statute[32] providing for review is as follows:
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> "(a) In addition to other remedies now available at law or in equity, any party aggrieved by any final finding, order, or judgment of the commission, shall have the right, regardless of the amount involved, of appeal to the Chancery Court, First Judicial District of Hinds County, Mississippi. If an application for rehearing has been filed, an appeal must be filed within thirty (30) days after the application for the rehearing has been refused or deemed refused because of the commission's failure to act thereon within the time specified in the preceding section or, if the application is granted, within thirty (30) days after the rendition of the decision on rehearing. If an application for rehearing has not been filed, an appeal must be filed within thirty (30) days after the entry of the commission's order. Every appeal shall state briefly the nature of the proceedings

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[29] Miss. Code Ann. § 7716-25 (1942).
[30] Miss. Code Ann. § 7716-29 (1942).
[31] Miss. Code Ann. § 7716-31 (1942).
[32] Miss. Code Ann. § 7716-26 (1942).

before the commission, and shall specify the order complained of. Any person whose rights may be directly affected by said appeal may appear and become a party, or the court may upon proper notice order any person to be joined as a party.

(b) Upon the filing of an appeal the clerk of the chancery court shall serve notice thereof upon the commission, whereupon the commission shall, within sixty (60) days (or within such additional time as the court may for cause allow) from the service of such notice, certify to the chancery court the record in the case, which record shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; provided however, that the parties and the commission may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

(c) No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record and evidence transferred.

(d) The court may hear and dispose of the appeal in term time or vacation and the court may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may be, but in case the order is wholly or partly vacated the court may also, in its discretion, remand the matter to the commission for such further proceedings, not inconsistent with the court's order as, in the opinion of the court, justice may require. The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights."

The pending of proceedings to review does not, of itself, either stay or suspend the operation of the order of the Commission—except in the case of a rate order where a utility has put rates into effect under bond as is provided in Section 7716-10 of the Code of 1942. However, any party may, as a matter of right, secure an order from the court in which the review or appeal is sought, suspending or staying the operation of the Commission's order by adequately securing the other parties against loss due to the delay in the enforcement of the order in case the order under review is affirmed—the security to be of such form and amount as shall be directed by the court granting the stay or suspension. If an appeal is taken from an order of the Commission reducing existing rates or refusing to approve rates proposed by a utility, the court, in suspending the order of the Commission and pending final determination of the appeal, either permits the existing rates to remain in effect or places the proposed rates in effect, provided a bond is filed, in a reasonable amount approved by the court with sureties approved by the court, conditioned upon refund, with lawful interest to the parties entitled thereto of the amount of the excess if an existing rate or the rate so put into effect is finally determined to be excessive. Or, the court may, if a utility has put rates into effect under bond under the section above referred to, require the utility to file a bond for such additional amount as the court deems proper.[33]

Appeals in accordance with law may be made to the Supreme Court of Missssippi from any final judgment of the chancery court.[34] The Commission is empowered to apply to the chancery court, First Judicial District of Hinds County, for enforcement by mandamus, injunction or other appropriate remedy of any order of the Commission.[35] The subject matter of appeals of this nature embody a field of law so vast as to defy any attempt of discussion in an article of this nature. However, limiting this discussion to the statutory provisions, it should also be pointed out that in a recent case[36] our Court held that Section 7699, Code of 1942, which was left remaining in the Code at the time of the enactment of Section 7716-26, (Section 7699 provides for appeals from the Commission to the First Judicial District, Circuit Court of Hinds County within six months), was superseded and the effect thereof was to transfer to the Chancery Court of Hinds County (first Judicial district) the appellate jurisdiction heretofore existing in the circuit court and reduce the time for appeal to thirty days instead of six months. In this same case, the Court also held that certiorari under Section 1207 of the Code of 1942, the general statute on appeals by certiorari, would not lie since the writ would not issue in those cases where there is a plain, speedy and adequate remedy by appeal—the City of Jackson had available to it a plain and adequate remedy by appeal under Section 7716-26.

These few observations and citations are less than elemental to those accustomed to dealing in this technical field of law and, if any purpose is served hereby, it is simply to remind the rest of us that such procedure does exist.

D. MISSISSIPPI EMPLOYMENT SECURITY COMMISSION

The Mississippi Employment Security Law was originally enacted in 1936.[37] In 1940 a commission composed of three members to be known as the Unemployment Compensation Commission was provided for,[38] and in 1944 and 1948 certain amendments thereto were adopted[39] while certain other changes were made in 1956[40] and in 1958.[41] Since July 1, 1948, the Unemployment Compensation Commission has been designated as the Mississippi Employment Security Commission.[42] It is the duty of the Commission to administer the employment security law, and the Commission has the power to adopt, amend or rescind rules and regulations and do certain other things not inconsistent with the Act.[43] General rules may be adopted, amended or rescinded by the Commission only after a public hearing or an opportunity has been given to be heard thereon—provided proper notice has been given. Such rules become effective ten days after being filed with the Secretary of State and publication in one or more newspapers of general circulation n the state. Regulations may be adopted, amended or rescinded by the Commission and become effective in the manner and at the time prescribed by the Commission.[44] Involuntary unemployment is the evil sought to be remedied, together with achievement of more stable employment and the systematic accumulation of funds during periods of employment in order to provide benefits for periods of unemployment. This result is accomplished by the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons when such unemployment arises through no fault of their own.[45] Weekly benefits for these purposes and the method and manner of computation are covered by statute,[46] as well as benefit elegibility conditions,[47] disqualifying conditions,[48] and the duration of such compensations.[49] Only insofar as the above comments pertain to the point of appeals and establish the fact of a fund from which benefits may be paid are they pertinent. Thus, the usual matter of appeal in this category involves the question of whether or not a claimant is entitled to benefits hereunder for a particular period. Claims for benefits are made in accordance with such regulations as the Commission may prescribe.[50] An examiner designated by the Commission takes a claim and an official determination is made thereon. The claimant and other parties to the determination are notified of the official determination and the reasons therefor. The jurisdiction of the Commission over claims involving no appeal is continuous. Claimant or any party to the determination may file an appeal from the initial determination of the examiner within seven days after notification thereof, or after the date such notification was made to his last known address.[51]

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[33] Miss. Code Ann. § 7716-27 (1942).

[34] Miss. Code Ann. § 7716-28 (1942).

[35] Miss. Code Ann. § 7716-30 (1942).

[36] Miss. Valley Gas Co. v. City of Jackson, 109 So.2d 637 (Miss. 1959).

[37] Miss. Laws c. 176 (1936).

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[38] Miss. Laws c. 295 (1940).
[39] Miss. Laws c. 288 (1944); Miss. Laws c. 412 (1948).
[40] Miss. Laws c. 404 (1950).
[41] Miss. Laws c. 533 (1958).
[42] Miss. Laws c. 412 (1948).
[43] Miss. Code Ann. § 7405 (1942).
[44] Miss. Code Ann. § 7406 (1942).
[45] Miss. Code Ann. § 7369 (1942).
[46] Miss. Code Ann. §§ 7373, 7374, 7375, 7376, 7377 (1942).
[47] Miss. Code Ann. § 7378 (1942).
[48] Miss. Code Ann. § 7379 (1942).
[49] Miss. Code Ann. § 7376 (1942).
[50] Miss. Code Ann. § 7380 (1942).

To facilitate the work of the Commission, there is a Board of Review[52] composed of three members, appointed by the Commission, and the Board of Review appoints one or more impartial appellate tribunals consisting in each case of either a referee, or a body consisting of three members—one, a referee who serves as a chairman, another, a representative of employees and the third, a representative of employers.[53] The appellate tribunals hear and decide appeal claims after affording the parties a reasonable opportunity for a fair hearing and affirm, modify or reverse the findings of fact and the initial determination. The parties are notified of this tribunal's decision together with the reasons therefor. This is deemed the final decision of the Board of Review unless within ten days after the date of notification or mailing of such decision, further appeal is initiated as hereinafter discussed. By statute, the Board of Review is required to permit further appeal from a decision of an appellate tribunal whch is not unanimous, or of one by an examiner whose decision has been overruled or modified by an appellate tribunal.[54] Furthermore, the Board of Review may on its own motion: affirm, modify, or set aside any decision of an appellate tribunal on the basis of evidence previously submitted; direct the taking of additional evidence; or permit any of the parties to such a decision to initiate further appeals before it. In addition, the Board of Review may itself take such an appeal or transfer to another appellate tribunal the proceedings on any claim pending before an appellate tribunal, and any proceedings so removed shall be heard in accordance with the requirements of Section 7382, Code of 1942. Within fifteen days after notice of appeal has been received by the Chairman of the Board of Review and thereafter within four days after its decision, the Board is required to notify the parties of its findings and decision.[55] In the absence of an appeal from the Board of Review to the circuit court, the decision of the Board becomes final ten days after the date of notification of mailing thereof.

These steps necessarily have been traced in detail since it is provided by statute that judicial review is permitted only after any party claiming to be aggrieved has exhausted these administrative remedies.[56]

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[51] Miss. Code Ann. § 7781 (1942).
[52] Miss. Code Ann. § 7404 (1942).
[53] Miss. Code Ann. §§ 7382, 7383, 7384 (1942).
[54] Miss. Code Ann. § 7384 (1942).
[55] Miss. Code Ann. § 7384 (1942).

The next step may then be an appeal to the circuit court. Within ten days after the decision of the Board of Review has become final any party aggrieved thereby may secure judicial review by commencing an action in the circuit court of the county in which the party resides. Such an action is commenced against the Commission for a review of its decision, and any other party before the Board of Review shall be made a defendant in the proceeding. This action is commenced by the filing of a petition, which need not be verified, but which must state the grounds upon which a review is sought. The petition is served on the Commission, or upon such person as the Commission may designate. Service in this manner is deemed complete on all parties provided there is left with the party so served as many copies of the petition as there are defendants–it being the duty of the Commssion to forthwith mail one such copy to each defendant. When the Commission files its answer, it is also required to certify and file with the circuit court all documents and papers and a transcript of all testimony taken in the matter together with the Board of Review's finding of fact and its decision. In its discretion the Commission may also certify to the circuit court questions of law involved in any decision. The findings of the Board of Review as to the facts, if supported by evidence, and in the absence of fraud, are conclusive and the jurisdiction of the circuit court is confined to questions of law. Such action and the questions so certified are given precedence over all other civil cases. An appeal from the decision of the circuit court may be taken to the Supreme Court in the same manner, not inconsistent with the provisions of the Act, as is provided in civil cases. It is not necessary to enter exceptions to the rulings of the Board of Review and no bond is required for taking such an appeal. Upon final determination by the circuit court, or the Supreme Court as the case may be, the Board of Review is required to enter an order in accordance with the determination made by the court· Any petition for judicial review does not act as a supersedeas or stay unless the Board of Review shall so order. The procedure outlined above is provided for and controlled by statute.[57] The statute provides, and the Supreme Court has so held, that findings of fact by the Board of Review amply supported should be taken as conclusive both by the circuit court and the Supreme Court on review.[58] Under Section 7389 of the Code of 1942, the Commission is authorized to appeal from decisions of the Board of Review involving questions of interpretation of the general act, and notice of appeals are served upon other parties and heard by the courts in the manner as provided in the general statute above outlined—providing that such appeal by the Commission does not have the effect of denying benefits to any claimant who has been awarded benefits by virtue of the decision of the Board of Review from which the appeal is taken.[59]

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[56] Miss. Code Ann. § 7387 (1942).

[57] Miss. Code Ann. § 7388 (1942).

[58] Miss. Unemployment Compensation Commission v. Avent, 192 Miss. 85, 4 So.2d 296, *appeal dismissed* 316 U.S. 641 (1941).

The Unemployment Compensation Law has been upheld as not infringing upon any of the sovereign powers retained by the state and recited in the State Constitution.[60] Other interesting questions such as whether or not unemployment must be involuntary in order for a claimant to be eligible for benefits; denial of a union member's benefits under the Act because of his refusal to accept non-union employment;[61] and the test to be applied to determine the existence of the employer-employee relationship under the Act[62] have been considered by the Mississippi Supreme Court.

E. OIL AND GAS BOARD

In order to foster, encourage and promote the development, protection and utilization of the natural resources of oil and gas in Mississippi and to protect the public and private interests against the evils of waste in the production and utilization thereof, a State Oil and Gas Board composed of five members was created in Mississippi and vested with certain powers and duties.[63] These powers and duties are enumerated by statute.[64] In carrying out these functions, the Board has authority to prescribe its rules of order and procedure in hearings or other proceedings before it. A competent shorthand reporter is required to be present throughout all public hearings, and the Board has the same control over such reporter, and the reporter's duties are the same, as those fixed by statute for court reporters insofar as they are applicable. The original transcript of testimony taken in any hearing and reduced to writing by the reporter is evidence of such proceeding, and on appeal to the circuit court, the original of such transcript shall be used.[65] No rule, regulation or order, change, renewal, or extension thereof shall be made by the Board, in the absence of an emergency, except after public hearing upon at least ten days' notice by publication in a newspaper of general circulation in the county or counties in which pools are located in the manner and form as may be prescribed by the Board by general rule. Any person having any interest in the subject matter is entitled to be heard.[66] In the event of an emergency, determined by the Board, it may act without having a hearing as above mentioned and such rule, regulation or order so adopted remains in force for forty-five days from its effective date, or, in any event, expires when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency becomes effective.[67] Notice and service may be made by any officer authorized to serve process or notice may be issued by any member of the Board or its supervisor, and any agent of the Board in the same manner as is provided by law for the service of summons in civil actions of the circuit court.[68] The rules, regulations and order of the Board are required to be kept in writing and entered in full by the Secretary of the Board in a book which is a public record and open to inspection at all times during reasonable office hours, and copies of any such rules, regulations, or orders certified by a member of the Board, or the secretary thereof, are received in evidence in all courts of the state with the same effect as the original.[69]

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[59] Unemployment Compensation Commission v. Barlow, 191 Miss. 156, 1 So.2d 241, 2 So.2d 544 (1941).

[60] Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

[61] Mills v. Mississippi Employment Security Commission, 89 So.2d 727, (Miss. 1956).

[62] Miss. Employment Security Commission v. Heidelberg Hotel Co., 211 Miss. 104, 51 So.2d 47 (1951).

[63] Miss. Laws c. 117 (1932); Miss. Laws c. 256 (1948); Miss. Laws c. 213 (1950).

[64] Miss. Laws c. 163 (1956).

[65] Miss. Laws c. 185 (1958).

Any interested person has the right to have the Board call a hearing for the purpose of taking action in respect to any matter within the jurisdiction of the Board by making a request therefor in writing. Upon receipt of such request the Board is required to promptly call a hearing thereon. After such hearing and with all convenient speed, and in any event, within thirty days after the conclusion of such hearing, the Board must take such action with regard to the subject matter as it may deem appropriate.[70] However, our Supreme Court has held that though this statute places upon the Board the responsibility of acting expeditiously, it does not provide that action of the Board taken more than thirty days after the hearing is invalid—the Board having a right to continue a hearing in order to determine what it should do.[71]

This statutory background seems to be necessary, at least to the author, in order to arrive at an appropriate point to discuss appeals from actions of the Board.

Perhaps attention should first be directed to the fact that by express statutory provision no temporary restraining order or injunction of any kind shall be granted against the Board, or any agent, employee or representative of the Board, restraining it from enforcing any statute of Mississippi relating to conservation of oil and gas, or any rule, regulation, or order thereof except after due notice to the Board and all other defendants. Furthermore, no temporary restraining order or injunction shall be granted except after a hearing in which it shall be clearly shown to the Court that the act done or threatened is without sanction of law, or that the provision of law, or the rule, regulation, or order complained of is invalid, and that, if enforced against the complainant, will force an irreparable injury.[72] With respect to any such order or decree granting temporary injunctive relief thereunder, it is further provided that the nature and extent of the probable invalidity of the statute or of any provision, rule, regulation or order thereunder involved in such suit must be recited in an order or decree granting temporary relief as well as a clear statement of the probable damage relied upon by the court as justifying temporary injunctive relief. Such temporary injunction or restraining order becomes effective only after the complainant executes a bond in such amount and upon such conditions as the court may direct.[73] Obviously, these references pertain to procedure in the chancery court.

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[66] Miss. Laws c. 185 (1958).
[67] Miss. Laws c. 185 (1958).
[68] Miss. Laws c. 185, § 1d (1958).
[69] Miss. Laws c. 185, § 1e (1958).
[70] Miss. Laws c. 185, § 1f (1958).
[71] Superior Oil Co. v. Foote, 214 Miss. 857, 59 So.2d 85, (1952), *suggestion of error overruled* 214 Miss. 890, 59 So.2d 844 (1952).

In addition to these remedies, and others now available, the State or any interested person aggrieved by any final rule, regulation, or order of the Board has the right, regardless of the amount involved, to appeal to the circuit court of the First Judicial District of Hinds County, Mississippi, or to the circuit court in which all or a part of the property affected by such rule, regulation, or order is situated. Such an appeal should be taken with thirty days from the date of the final rule, regulation or order. The circuit court may affirm the matter or reverse it for further proceedings as justice may require. All such appeals may be heard and determined either in term time or in vacation on the record, including a transcript of pleadings and testimony filed or heard by the Board, and such appeal must be heard and disposed of promptly by the court as a preference cause. The same provisions concerning notice to the reporter and the allowance of bills of exception now or hereafter in force respecting appeals from circuit court to the Supreme Court are applicable—except that the reporter is required to transcribe his notes and file the transcript within thirty days after approval of the appeal bond.[74]

An appeal may be instituted by filing a petition with the Board whereupon it becomes the duty of the Board, as promptly as possible, and in any event within sixty days after approval of the appeal bond, to file with the clerk of the appropriate circuit court a copy of the petition and of the rule, regulation, or order appealed from together with the original and one copy of the transcript of the record of proceedings in evidence before the Board. After the petition has been filed, the appeal is perfected by filing a bond in the sum of five hundred dollars with two sureties or a surety company qualified to do business in Mississippi, conditioned to pay the cost of such an appeal. The bond may be approved by any member of the Board or the Supervisor or by the Clerk of the court to which the appeal is taken. Perfection of the appeal does not stay or suspend the operation of any rule, regulation or order of the Board, but the judge of the circuit court to which the appeal is taken may award a writ of supersedeas after five days' notice to the Board and after a hearing. The order or judgment staying the operation thereof must contain a specific finding based upon evidence submitted to the circuit judge and identified by reference thereto that great or irreparable damage would result to the appellant if such relief were denied. The stay does not become effective until a supersedeas bond, payable to the State, is filed and approved by the clerk of the court or the circuit judge—the amount thereof to be fixed by the circuit judge and conditioned as directed in the order granting the stay.[75] Thereafter, an appeal may be taken to the Supreme Court in accordance with the general laws of our state relating to appeals from any judgment of the circuit court (or from the chancery court as hereinbefore discussed). Such an appeal when docketed in the Supreme Court is placed on the preference docket and may be advanced as the Court directs.[76]

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[72] Miss. Laws c. 185, § 2c (1958).
[73] Miss. Laws c. 185, § 2d (1958).
[74] Miss. Laws c. 185, 2a (1958).

As was stated with reference to appeals from the Public Service Commission, a vast field of law is involved in appeals of this nature and no attempt is here made to deal therein.

The power of the Board to require compulsory pooling has been upheld by our Supreme Court as within the police power of the state and is constitutionally valid.[77] Spacing rules, adopted by the Board under its delegation of legislative power, have also been upheld as a reasonable exercise of police powers. In *Superior Oil Company v. Griffith,*[78] the Supreme Court held that the extent of its authority on appeal was limited to that of the circuit court, which was to affirm the order of the Board or reverse it for further proceedings—the court in that case declined to modify an order of the Board.

These, then, are some of the fundamental principles applicable from a consideration of the statutes and interpretations by our Supreme Court regarding the appeals herein discussed.

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[75] Miss. Laws c. 185, § 2b (1958).

[76] Miss. Code Ann. § 6132-27 (1942).

[77] Superior Oil Co. v. Foote, supra note 71.

[78] Superior Oil Co. v. Griffith, 214 Miss. 900, 60 So.2d 505, *sustaining suggestion of error* 214 Miss. 891, 59 So.2d 104 (1952); Harper, Administrative Procedure Before The State Oil and Gas Board, 29 Miss. L.J. 82 (1957).

PRACTICE AND PROCEDURE ON APPEALS IN THE SUPREME COURT OF MISSISSIPPI

*Fred J. Lotterhos, Jr.**

It is the purpose of this article to present and discuss the various facets of this topic as completely as space permits, trusting that such an overall treatment will be of assistance to members of the Bar, and of general interest to those others to whom these presents might come. In keeping with the theme of this issue of the Journal, the discussion will be limited to appeals from the circuit court to the Supreme Court.

It is suggested that this paper be read with a copy of the August, 1958 special issue of the *Mississippi Law Journal* at hand for reference. That issue, containing as its does the revised rules of the Supreme Court, annotated by Mr. Kenneth G. Perry, and the article entitled "Some Suggestions as to Oral Arguments and Written Briefs in the Supreme Court of Mississippi," by Judge W. G. Roberds, together with the present article should cover the field of Supreme Court practice and procedure in this State.

Chapter 12, Title 10, of the Code of 1942, provides for the establishment of the Supreme Court, its make-up, jurisdiction and function. This Chapter not only prescribes certain procedures to be followed in Supreme Court practice, but authorizes the Court to make such rules regarding the preparation of records, and regulations prescribing the mode of pleading and practice, as may be expedient and necessary and proper "for certainty and dispatch of business, and may dismiss causes for non-compliance with any of the rules."[1]

The Supreme Court is an appellate court and possesses such jurisdiction as properly belongs to a court of appeals; and is to hear and determine all manner of pleas, complaints, motions, causes, and controversies, civil and criminal, which may be brought before it, and which shall be cognizable in said court. A cause shall not be removed to the Supreme Court until final judgment is rendered in the court below, except in cases particularly provided for by law; and the court may grant new trials and correct errors of the circuit court in granting or refusing the same.[2]

An appeal is not a matter of right, but is regulated by statute, and will only lie in cases provided for by statute. Thus, no appeal lies by attorneys for plaintiff from a voluntary non-suit without prejudice;[3] nor by counselors of the court, nor amicus curiae from a judgment reinstating a disbarred attorney;[4] nor from an order or judgment vacating a writ of garnishment and dismissing the suit as to a garnishee, where the writ of garnishment is issued as a part of an attachment writ in a suit still pending in the trial court at the time of the attempted appeal.[5]

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[1] Miss. Code Ann. § 1961 (1942).

[2] Miss. Code Ann. § 1945 (1942).

[3] State ex rel. Brown v. Poplarville Sawmill Co., 119 Miss. 432, 81 So. 124 (1919).

The Court has no power or duty to render advisory opinions,[6] nor will it adjudicate moot questions.[7] In *Sheldon v. Ladner,*[8] the Court said:

> "We have repeatedly declared that we would not adjudicate moot questions . . . . In the Sellier case, supra, we said (174 Miss. 360, 164 So. 768): 'There is no principle of law better established than that courts will not adjudicate moot questions; that they will only decide real controversies, not imaginary ones; and that no judgment will be rendered which is unenforceable and therefore useless' . . . . As to the appellant's defense against this motion, that we should issue an advisory opinion, we have several times declared our lack of authority to do so. We have specifically said in re Opinion of the Justices, 148 Miss. 427, 114 So. 887, 888, dealing with advisory opinions between departments of the State government: 'Moreover, and aside from this prohibition, the giving by judges of opinions on questions that may thereafter be submitted for decisions to the courts of which they are members is highly improper unless they are constitutionally authorized so to do.' 'We are not authorized by the Constitution to do so herein . . . .' California Company v. State Oil and Gas Board, et al, 200 Miss. 824, 27 So.2d 542, 28 So.2d 120, 121."

Nor is the advantage to the administration of justice by a clarification of the matters on which an advisory opinion is sought a persuasive argument for rendering same, there being no such authority in the court under the Constitution and laws of the State.[9]

As to what justiciable controversies are "cognizable in said court" within the meaning of Section 1945 of the Code of 1942, there actually seems to be but little question, once the finality provision of that section is satisfied. As the Court early held, it may hear and determine all motions and issues necessary to the exercise of its appellate power, and necessary to the preservation of its dignity and the enforcement of its orders.[10]

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[4] Jones v. Cashin, 133 Miss. 585, 98 So. 98 (1923).

[5] Craig v. Barber Brothers Contracting Co., 190 Miss. 182, 199 So. 270 (1940).

[6] Van Norman v. Barney, 190 Miss. 581, 25 So.2d 324 (1946).

[7] Moran v. Murphy, 187 Miss. 633, 193 So. 29 (1940); Sellier v. Board of Election Commissioners of Harrison County, 174 Miss. 360, 164 So. 767 (1935); Whidden v. Broadus, 108 Miss. 664, 67 So. 155 (1915); Rawlings v. Claggett, 174 Miss. 845, 165 So. 620 (1936); Cf. State ex rel. Whall v. Saenger Theaters, 190 Miss. 391, 200 So. 442 (1941); Sartin vs. Barlow ex rel. Smith, 196 Miss. 159, 16 So.2d 372 (1944).

[8] 205 Miss. 264, 38 So.2d 718 (1949).

[9] Gipson v. State, 203 Miss. 434, 35 So.2d 327, *Sugg. of Error Overruled,* 36 So.2d 154 (1948); Gangloff v. State, 99 So.2d 461, (Miss. 1958).

The tribunal from which the appeal is taken must, of course, have jurisdiction in the first instance, or the Supreme Court can have none. And this objection, being jurisdictional, may be raised for the first time before the Supreme Court, and the Court may, as in other cases of lack of jurisdiction, dismiss such an appeal of its own motion.[11]

Complementing Section 1945 of the Code of 1942, in its appeal requirement of final judgment, except in cases particularly provided for, is Section 1147 of the Code of 1942, here set out in full:

> "An appeal may be taken to the Supreme Court from any final judgment of a Circuit Court in a civil case, not being a judgment by confession or from any final decree in the Chancery Court, not being by consent, by any of the parties or legal representatives of such parties; but such appeal shall operate as a supersedeas only when the party applying for the same shall comply with the terms hereinafter prescribed; and in no case shall such appeal be held to vacate the judgment or decree."

A summary of the construction that has been accorded this last Section should conclude this introduction on the jurisdiction and general function of the Supreme Court, and prepare the way for a study of the progress of an appealed case from the first to the last step, which study will constitute the next, and principal portion of this article.

A final judgment of a circuit court, to be appealable, must be one which adjudicates the merits of the controversy.[12] However, in *Solomon v. Continental Baking Company,*[13] the Court positively stated that though a judgment of involuntary dismissal without prejudice does not finally terminate the rights of the parties, it is a final determination of that particular suit, and is to be understood as final for appeal purposes. The Court there disapproved and expressly overruled the broad statements implying the contrary in some earlier cases.

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[10] Planters Insurance Co. v. Kramer, 47 Miss. 200 (1872); Brown v. Carraway, 47 Miss. 668 (1873).

[11] Ball, Brown & Co. v. Sledge, 82 Miss. 747, 35 So. 214 (1903); Rodgers v. Hattiesburg, 99 Miss. 639, 55 So. 481 (1911); Rayborn v. Cothern, 43 So. 70 (Miss. 1907); Jones v. State, 47 So. 479 (Miss. 1908); Murphy v. Hutchinson, 47 So. 666 (Miss. 1908); Donald Brothers Mercantile Co. v. Marsh, 48 So. 230 (Miss. 1909); McCoy v. McRae, 204 Miss. 309, 37 So.2d 353 (1948); Ruff v. Montgomery, 83 Miss. 184, 35 So. 465 (1903); Travillion v. State, 206 Miss. 236, 39 So.2d 773 (1949); Waits v. Black Bayou Drainage District, 186 Miss. 270, 185 So. 577 (1939); J. R. Watkins Co. v. Guess, 196 Miss. 438, 17 So.2d 795 (1944); Ainsworth v. Blakeney, 227 Miss. 544, 86 So.2d 501 (1956).

[12] Roach v. Black Creek Drainage District, 206 Miss. 794, 41 So.2d 5 (1949); Bank of Courtland v. Long Creek Drainage District, 133 Miss. 531, 97 So. 881 (1923); G. and S. I. RR. Co. v. Williams, 109 Miss. 549, 68 So. 776 (1915).

[13] 174 Miss. 890, 165 So. 607 (1936).

In the case of *Roach v. Black Creek Drainage District,*[14] the sustaining of defendant's demurrer to a petition for a writ of mandamus was held to be merely interlocutory, and so not appealable. In reannouncing the rule, the Court quoted from its opinion in *State Ex Rel Rice, Attorney General v. Large,*[15]as follows:

> " 'No appeal is allowable from a Circuit Court judgment unless the judgment is in all respects a final judgment, Sections 13, 3361, Code of 1930; Moore v. Montgomery Ward and Company, 171 Miss. 420, 156 So. 875; and, of course, an order ruling on a demurrer and which goes no further than simply to rule on the demurrer, is no final judgment, Pine Lumber Company v. Covington County, 87 Miss. 706, 40 So. 260 . . . .' "

And, in the *Bank of Courtland v. Long Creek Drainage District* case,[16] the reason given by the Court for not allowing an appeal from a judgment ruling upon a demurrer was that it did not "state that the plaintiff recover nothing from the defendant; neither does it acquit the defendant of liability and tax the costs against the plaintiff."

Where in a quo warranto proceeding the defendant appeared and filed two special pleas, the demurrer to each of which was overruled, and no further steps taken, nor final judgment rendered, an order allowing an appeal by the State in order "to settle the principles of law involved in said suit" was erroneous.[17]

The finality of a judgment for purposes of appeal is suspended until the disposition of a motion to set it aside,[18] or of a motion for a new trial.[19] And if a new trial is granted, no appeal can be taken until the same is accomplished.[20] The fact that the trial court has full control over its judgment during the whole of the term at which it was rendered does not serve to postpone the finality of a judgment past the date of the rendition. The date of the rendition of a judgment at law is the pronouncement thereof by the court at the conclusion of the trial, and this date is determined by the entry of the judgment on the minutes of the court.[21] Sections 1146, et seq, of the Code of 1942, establish the mechanics of an appeal to the Supreme Court. Of these, Section 1147 has already been noticed.

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[14] 206 Miss. 794, 41 So.2d 5 (1949).

[15] 171 Miss. 330, 157 So. 694 (1934).

[16] 133 Miss. 531, 97 So. 881 (1923).

[17] State ex rel. Rice, Attorney General v. Large, supra at note 15.

[18] Johnson v. Mississippi Power Co., 189 Miss. 67, 196 So. 642 (1940).

[19] Shaw v. Bula Cannon Shops Inc., 205 Miss. 458, 38 So.2d 916 (1949); Moore v. Montgomery Ward and Co., 171 Miss. 420, 156 So. 875 (1934); Cf. Edwards v. Peresich, 221 Miss. 788, 74 So.2d 844 (1954).

[20] Brown v. Carraway, supra note 10; Haise v. Lorch, 47 Miss. 685 (1873); Y. & M.V.R.R. Co. v. Reid, 90 Miss. 616, 43 So. 952 (1907).

[21] Johnson v. Mississippi Power Co., supra note 18; Greene v. Callon, 102 So.2d 676 (Miss. 1958).

Section 1146 of the Code of 1942, abolishes writs of error, and provides that all cases, civil and criminal, at law and in chancery, are to taken to the Supreme Court by appeal as provided in this Chapter—and shall be dealt with by said Court without regard to the manner of removing the cases to the court.

This statutory method of review by appeal is exclusive of all others, and there is no authority for the Supreme Court's reviewing a case by certiorari.[22] There follows a step by step resume of this exclusive statutory method of review, which may bring to light in the reading, as it did in the writing, certain procedures and case law on the subject not heretofore fully appreciated.

> "The mode of obtaining an appeal from any judgment or decree, other than such as are provided for to be granted by the court or chancellor, shall be by petition, in writing, to the clerk of the court where the judgment or decree was rendered, or where the record of the judgment or decree to be appealed from may be."[23]

> "The petition for appeal need only state the rendition of the judgment or decree to be appealed from, and ask for an appeal; and such petition shall be marked by the clerk 'filed' and shall be dated and the marking filed shall be signed by him; and he shall copy said petition, with the endorsements on it, in the transcript of the record to be made by him; and the time of presenting such petition for an appeal shall be considered the time of taking the appeal, if bond be then given as required."[24]

However,

> "A written petition for an appeal shall not be necessary to its validity, but filing in the office of the Clerk of the Supreme Court a transcript of the record of the case in which the appeal is taken shall confer jurisdiction on the Supreme Court to try and dispose of the case; and where there is no petition for the appeal, it shall be considered to have been taken when the appeal bond was filed; or, if there be no bond, from the time of filing the transcript of the record in the office of the Clerk of the Supreme Court."[25]

Section 1174 of the Code of 1942, should be considered with the foregoing, providing as it does that:

"Except as herein otherwise provided, an appeal shall not be considered as perfected, nor a supersedeas awarded thereon, unless the bond required shall have been given and approved."

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[22] Shapleigh Hardware Co., Inc. v .Brumfield, 159 Miss. 175, 130 So. 98 (1930).
[23] Miss. Code Ann. § 1154 (1942).
[24] Miss. Code Ann. § 1155 (1942).
[25] Miss. Code Ann. § 1160 (1942).

The foregoing sections are not altogether clear, without the judicial interpretation they have received, and as those cases have construed them, they could have been more directly phrased to advantage.

Section 753 of the Code of 1942, appearing under the Chapter: "Limitations of Action," prescribes the time within which an appeal must be taken. The section, which has a savings clause for infants and insane persons, provides that appeals to the Supreme Court shall be taken within ninety days next after the rendition of the judgment complained of and not after.

These clarifications upon this very basic matter of perfecting the appeal, and within the prescribed time limitation, have been made: If an appeal bond is required by law, the appeal can be perfected only by filing the prescribed bond within the ninety day period.[26] More will be said later of the necessity for and the requirements of the appeal bond. The tender of the appeal bond without anything more is sufficient to perfect the appeal,[27] the petition for appeal being mere surplusage and formality. The appeal bond may be approved by the Clerk of the Court from which the appeal is taken.[28] If a petition for appeal is not presented in writing to the clerk of the trial court, and no appeal bond is filed or required, then the transcript of the record must be filed with the Supreme Court Clerk within the period for appeal. If the transcript is not so filed, even though the delay is caused by the clerk's negligence, the appeal is barred.[29] An appeal may not be barred, however, where there is a question as to the necessity for an appeal bond, (one not being filed though actually required) and the petition for appeal is timely presented to the trial court clerk, and though the record transcript is not filed with the Supreme Court Clerk within the time prescribed, if it appears that under the circumstances a real effort in good faith was made to take the appeal, without intentional delay, or damage or prejudice to the other side.[30] The proper perfection of an appeal to the Supreme Court within the time allowed by statute is jurisdictional to the appeal.[31] As has been seen, however, in certain unusual cases, the letter of the law may be relaxed in its application.

If there are court reporter's notes of testimony which must be transcribed, and which the appellant wishes to include in the appeal record, then he must heed the ten day jurisdictional period within which notice is to be given to the court reporter. Section 1640 of the Code of 1942, appearing under "Court Reporting" prescribes that any such person shall notify the court reporter in writing within ten days after the adjournment of the court of the fact that a copy of the notes is desired. The notice must be handed to the court reporter personally, or mailed to him at his usual place of abode. The attorney making the request shall file with the clerk of the court a copy of the notice, with a statement as to how the notice was served. Section 1191.5 of the Code of 1942, provides for the appellee's giving of such notice if he desires where it is not given by appellant.

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[26] Miller v. Phipps, 152 Miss. 437, 119 So. 170 (1928); Duncan v. Brock, 216 Miss. 406, 62 So.2d 562 (1953); Davidson v. Hunsicker, 224 Miss. 203, 79 So.2d 839 (1955); G. M. and O. R. Co. v. Forbes, 228 Miss. 134, 87 So.2d 488 (1956).

[27] Schwartz v. McKay, 184 Miss. 422, 185 So. 200 (1938).

[28] Miss. Code Ann. § 1173 (1942).

[29] Oswalt v. Austin, 192 Miss. 653, 6 So.2d 924 (1942).

[30] Sabougla Drainage District v. People's Bank and Trust Co., 191 Miss. 331, 1 So.2d 219 (1941).

[31] G. M. & O. R. R. Co. v. Forbes, supra note 26; Davidson v. Hunsicker, supra note 26; Henry v. Field, 200 So. 726 (Miss. 1941).

The giving of the notice to the court reporter required by Section 1640 is jurisdictional,[32] and if the notice there called for is not timely given, the reporter's notes cannot be considered, and will be stricken from the appeal record; nor does the Supreme Court have any authority to require by its order their transcription or forwarding. And if the notes are necessary to the consideration of the appeal, their absence will require dismissal of the appeal.[33]

The time for this notice only begins to run after the judgment becomes final and appealable; that is, after all motions are disposed of, before or after adjournment of the court for the term.[34] Nor is a notice valid where given prior to the disposition of a motion for a new trial which was under consideration by the court.[35] The ten day period runs from the time the court actually adjourns, and not from the expiration of the time allowed by law for holding the particular term of court.[36] Although the notice provided for in Section 1640 is said to be jurisdictional, the court has said:[37]

> "This entire statute in reference to stenographer's notes should be liberally construed in aid of litigants prosecuting in good faith appeals to this court, and in effectuating the manifest scheme and purpose of the act to enable the Supreme Court to exercise its constitutional appellate jurisdiction."

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[32] McGee v. State, 203 Miss. 609, 35 So.2d 628 (1948); Mayflower Mills v. Breeland, 168 Miss. 207, 149 So. 787 (1933); Ocean Springs Bank v. Frederick, 145 Miss. 553, 110 So. 366 (1926); Jackson Opera House Co. v. Cox, 188 Miss. 237, 191 So. 665 (1939).

[33] Peck and Hills Furniture Co. v. Greer, 166 Miss. 248, 146 So. 311 (1933); American Creosote Works v. Rose Brothers, 211 Miss. 173, 51 So.2d 220 (1951); Ivy v. Robertson, 220 Miss. 364, 70 So.2d 862 (1954); Ruiz v. Ruiz, 101 So.2d 533 (Miss. 1958); Redmond v. Hilliard, 190 Miss. 839, 200 So. 130 (1941); Shaw v. Bula Cannon Shops, Inc., supra note 19; Ashe v. Ballard, 223 Miss. 397, 78 So.2d 476 (1955); Gandy v. Kirkland, 224 Miss. 508, 80 So.2d 767 (1955).

[34] Young v. Alexander, 122 Miss. 643, 84 So. 697 (1920); Tullos v. Simpson County, 124 Miss. 121, 86 So. 358 (1920).

[35] Mayflower Mills v. Breeland, supra note 32; Redmond v. Hilliard, supra note 33; Shaw v. Bula Cannon Shops, Inc., supra note 19.

[36] Dunn v. Green, 124 Miss. 602, 86 So. 852 (1921).

[37] N. O. and N. E. Ry. Co. v. Catts, 109 Miss. 340, 68 So. 483 (1915).

Having perfected his appeal, and given notice to the court reporter, the appellant must now obtain service of process upon the appellee summoning him to answer the appeal. Sections 1186 and 1189 of the Code of 1942, are the basic sections concerning this point. The first provides for service by the sheriff of the proper county upon the appellee or his attorney of the summons to appear and answer the appeal, the process to be served at least ten days before the time when it is returnable. A summons served within ten days of its return date shall be good for the term next after that to which it is returnable. It is the duty of the trial court clerk, under Section 1189, in all civil cases where the appeal is not perfected during the term of the court at which the judgment complained of is rendered, to issue this summons to the appellee.

The most recent judicial discussion of these two sections is found in *Home Insurance Company v. Watts,*[38] where the court held that compliance with the provisions of Sections 1186 and 1189 is jurisdictional and not procedural, that if no process is had, if the appeal is not taken during the specified term of court, if there be no formal waiver of process, and if no appearance to the appeal is entered by the appellee, then no valid judgment can be entered against the appellee by the Supreme Court. In that case, the court availed itself of Rule 33 and its provision for relaxing the rules in special cases, here to the extent of allowing a second suggestion of error to be filed in order to present this jurisdictional obstacle to its judgment.

There is no statute fixing the time when the summons to answer the appeal shall be served, but it is a rule of court established by long practice that the writ shall be returnable to the first return date which is more than ten days after the appeal is perfected as above.[39] Return days for appeals are prescribed by Sections 1942 and 1955 of the Code of 1942, as supplemented by Rule 8 of the revised rules of the Mississippi Supreme Court. They are: The first day of the two terms of court, being the second Monday in September and the first Monday in March; and the first Monday of January, May and July.

Sections 1156 - 1159, of the Code of 1942, provide for the summoning of parties to a judgment or decree who do not initially join in the appeal, and requires them to join if they desire, or be barred from further right to appeal. Where all parties against whom the judgment was rendered do not join in the appeal and no summons is issued to those not joining, the appellee may have such summons issued; otherwise the appeal must be dismissed.[40]

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[38] 93 So.2d 848 (Miss. 1957); See also Cassidy v. Central Lumber Co., 219 Miss. 96, 67 So.2d 266 (1953); McAllister v. Richardson, 101 Miss. 132, 57 So. 547 (1912).

[39] Weir v. Killian, 59 Miss. 520 (1882); Meridian Coca-Cola Bottling Co. v. Watson, 163 Miss. 486, 138 So. 407 (1931); Yazoo and M.V. Ry. Co. v. McCarley, 106 Miss. 92, 63 So. 335 (1913); McAllister v. Richardson, supra note 38; Cf. Society of N. Y. Hospital v. Knox, 57 Miss. 600 (1880); Childs v. Rowell, 58 Miss. 512 (1880).

Having followed the above procedures, the appellant need do nothing until the return day for the appeal. As has been noted, this is the first return day which is more than ten days after the perfection of the appeal. On that date, it is incumbent upon him to "take notice that the clerk is required to send the appeal to the Supreme Court, where the cause will be docketed, and, if the record is not here on the return day, and the stenographer has not had the requisite time required by law in which to file his notes, that fact should be suggested to the court."[41]

It is the trial court reporter and clerk who are charged by statute with the proper preparation, circulation and transmittal of the appeal record, and once the appellant has followed the steps that have been outlined, the duties of those officials regarding the appeal are clear.

Section 1640 provides that upon receipt of the aforementioned notice from appellant, the court reporter shall immediately acknowledge receipt thereof and transcribe and file his notes with the trial court clerk within sixty days after the filing and approval of the appeal bond in cases where appeal bonds are required; and where such bonds are not required by law, within sixty days of the giving of such notice.

Section 1641 of the Code of 1942, provides for the appellant's examination and correction of the reporter's transcript for ten days and the reporter's mailing of notice to the attorneys in the case that he has filed his transcript with the trial court clerk. After that ten day period, the appellant's counsel shall deliver or mail the transcript to an attorney representing the appellee, attaching a certificate of the date of such mailing or delivery. The appellee's counsel shall be entitled to have the use of this transcript for five days from the date of the mailing or delivery by the appellant, for examination and suggested corrections therein. At the end of these five days, the transcript shall be returned to the trial court clerk. If corrections or suggestions as to alterations are made by either attorney, then the clerk shall forthwith deliver in person, mail or express the notes with all suggested corrections to the trial judge, who shall make such corrections as may be proper, and forthwith return the transcript of the notes to be corrected to the court reporter, who shall make all such corrections as the trial judge shall direct and return the same to the judge within ten days, who shall thereupon sign and return the notes to the clerk of the court, which shall be considered a correct transcript. But if both parties to the litigation, or their attorneys, shall enter upon the court reporter's notes, or file in the Supreme Court, a written agreement, that the same as originally filed, or as subsequently modified by agreement are correct, such transcribed notes shall become a part of the record in the case without the approval of the trial judge.

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[40] Tardy v. Rosenstock, 118 Miss. 720, 80 So. 1 (1918); U. S. F. & G. Co. v. Jackson, 123 Miss. 676, 86 So. 456 (1920).

[41] Warren v. State, 165 Miss. 783, 144 So. 698 (1932); Cf. Miller v. Phipps, supra note 26; Stewart v State, 179 Miss. 31, 174 So. 579 (1937).

Counsel must avail themselves of this "simple and adequate method" for correction of the transcript, and if they do not, a valid excuse should be offered as a predicate for a petition to correct the record after filing in the Supreme Court, and, in any event, the application for the correction should be made before the submission of the case to the Supreme Court.[42]

Section 1642 of the Code of 1942, provides for the trial judge's granting to the court reporter for good cause shown, an extension of time for completing his transcript, such extension not to exceed thirty days.

Section 1643 of the Code of 1942, provides that if the notice to the court reporter is given, then no court reporter's transcript of his notes shall be stricken from the record in the Supreme Court for any reason, unless it be shown that such notes are incorrect in some material particular, and then only in cases where such notes have never been signed by the trial judge, nor been agreed on by the parties, nor become a part of the record as provided by the chapter of the Code entitled "Court Reporting."[43]

Section 1644 of the Code of 1942, provides for the trial court clerk's transmittal of the appeal record, including the court reporter's transcript, to the Supreme Court Clerk.

Section 1189, already mentioned above, should be referred to again, providing as it does for the trial court clerk's immediately making and certifying a transcript of the record of the case to the Supreme Court, "when the appellant shall have complied with the law applicable to his appeal." The quoted phrase has been held to require such certification and transmittal only when the statutory time for the preparation, examination, correction and return of the reporter's transcript has expired, and then by the first return day thereafter, which obviously may be later than the return day for the appeal.[44]

Notice should be taken here of Rules 1, 2, 3, and 29, of the Revised Rules of the Supreme Court of Mississippi, entitled respectively, "Transcript—How Prepared;" "Transcript—What to contain;" "Agreed transcript," and Original Papers—When Considered."

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[42] National Box Co. v. Bradley, 171 Miss. 15, 154 So. 724 (1934), 157 So. 91 (1934); Great A. and P. Tea Co. v. Majure, 176 Miss. 356, 168 So. 468 (1936); Cf. Butler v. State, 217 Miss. 750, 65 So.2d 244 (1953).

[43] Redmond v. Hilliard, supra note 33; But Cf. Furr v. Brookhaven Creamery Co., 188 Miss. 1, 191 So. 684 (1939), Wilkinson v. Love, 149 Miss. 517, 111 So. 457 (1927).

[44] Yazoo and M. V. Ry. Co. v. McCarley, supra note 39; Hicks Mercantile Co. v. Musgrove, 108 Miss. 776, 67 So. 213 (1915).

Section 1644 also provides for the preparation of a bill of exceptions, setting forth appellant's conception of the evidence, rulings, etc., at the trial, under certain circumstances where the transcript of the reporter's notes is not available for consideration upon the appeal.[45]

In *Warren v. State,* supra at note 41, the court held that:

> "If the stenographer does not file his notes within the time allowed by law, counsel should take appropriate steps before the Circuit Court or the judge, to compel the filing of the notes, and should make a motion in this court that the case be passed until the notes can be obtained and the record filed here. Also, if the stenographer does not file his notes within the time allowed by law, the appellant should prepare a bill of exceptions containing the substance of the notes and present it to the Circuit Judge for approval, giving notice thereof to opposing counsel of the hearing before the judge. See Sections 725 to 730, inclusively, Code of 1930 (Sections 1640 - 1645, Code of 1942)."

It is likewise the duty of the appellant to invoke the aid of the Supreme Court to obtain a completed record when it appears that same has not been filed on or before the return day.[46] Read in the light of *Y. and M. V. R. Co. v. McCarley,*[47] which the Court cites, this return day would not necessarily be the return day for the appeal itself. A writ of certiorari from the Supreme Court is the proper remedy to seek in such a case, directing the clerk of the trial court to send up or complete the appeal record. Such relief must be invoked by the appellant without delay, however;[48] and, in *Miller v. Phipps,*[49] it was held that (there being no reporter's notes to copy):

"It is error for counsel to assume that, when the return day arrives, and the record is not filed by the clerk, they may delay application for the aid of this court."

A writ of certiorari from the Supreme Court is also the proper means to require the trial court clerk to send up parts omitted from the transcript of the record,[50] or properly to certify a record.[51] Rule 4 of the revised rules provides that:

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[45] See also concerning bills of exception, Miss. Code Ann. §§ 1531-1535 (1942).

[46] Cassidy v. Central Lumber Co., supra note 38.

[47] See note 39 supra.

[48] Walden v. State, 127 Miss. 486, 90 So. 177 (1922); Miller v. Phipps, supra note 26; Cobb v. Frazer, 209 Miss. 603, 48 So.2d 124 (1950).

[49] See note 26 supra .

[50] Aluminum Cooking Utensil Co. v. Shivers, 149 Miss. 197, 115 So. 345 (1928); Patridge v. McAtee, 225 Miss. 141, 81 So. 2d 714 (1955); Cf. Williams v. State, 178 Miss. 694, 172 So. 746 (1937); Sovereign Camp W. O. W. v. Duncan, 175 Miss. 724, 165 So. 546 (1936); Sims v. Crecink, 208 Miss. 873, 45 So.2d 737 (1950); Gaw v. City of Holly Springs, 87 So.2d 252 (Miss. 1956); Brown v. Sutton, 158 Miss. 78, 121 So. 835 (1929); Cf. Richmond v. Enochs, 109 Miss. 14, 21, 67 So. 649 (1915).

[51] Davis v. Davis, 37 So.2d 735 (Miss. 1948).

> "If a record be imperfect, diminution may be suggested by either party, and a writ of certiorari will be awarded, provided that if the filing of such a suggestion has been unnecessarily delayed to the prejudice of the opposite party, the writ will be awarded only upon such terms as the court may impose, or it may be refused altogether."

The alleged failure of the clerk below to incorporate in the record a bill of exceptions, and the alleged incorporation of matter not properly there, should be brought to the Supreme Court's attention by motion pointing out what portions should be stricken, and what portion the clerk failed to include in the appeal record, and not by motion to remand to perfect the record.[52]

Concerning the above mentioned duty of the appellant to act if the appeal record has not been filed with the Supreme Court Clerk by the return day, the court clarified its view of this problem in *Cobb v. Frazer*.[53] There, it discounted appellant's argument that: Prejudice to appellee must be shown before a dismissal will be granted, and that even a dismissal will not be allowed if appellant is guilty of no negligence, and that because of a crowded docket, the case could not have been reached during the past term anyway. The court followed the earlier cases and held the appellant to be negligent in not applying for certiorari when the return day for the record had passed; that the cause had been unduly delayed to appellee's prejudice because of failure to prosecute the appeal with diligence; and, that there was no sufficient showing of excuse for the default. The court concluded that the appeal should be dismissed under the provisions of Section 1966 of the Code of 1942. That Section provides that it shall be lawful for the court, on appellee's motion, to dismiss an appeal when the appeal record shall not be filed with the Supreme Court Clerk on or before the return day to which the appeal is returnable by law or by rule of court.

Assuming that all of the foregoing steps and procedures have been timely followed by the parties specified, the case is now properly on appeal before the Supreme Court. Section 1949 of the Code of 1942, requires the Clerk of the Supreme Court to make out and keep a docket of all civil cases pending in or which may be brought to the court, and to place thereon all such cases in the order in which they may be filed. Section 1962 of the Code of 1942, provides that the Supreme Court shall hear and determine all cases properly brought before it at the return term, unless cause be shown for a continuance.

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[52] Brasswell v. Board of Supervisors of Copiah County, 183 So. 278 (Miss. 1938); See also the following: Stewart v. Highway Commission, 185 Miss. 328, 186 So. 633 (1939); Mauney v. Gulf Refining Co., 193 Miss. 421, 8 So.2d 249 (1942); Carroll Notion Co. v. Neville, 217 Miss. 699, 65 So.2d 140 (1953); Swaney v. White, 92 So.2d 453 (Miss. 1957); Freeman v. Mississippi Power and Light Co., 92 So.2d 453 (Miss. 1957); Shows v. City of Hattiesburg, 92 So.2d 365 (Miss. 1957); Sly v. Gilliland, 207 Miss. 356, 42 So.2d 393 (1949); Delta Chevrolet Co. v. Waid, 211 Miss. 256, 51 So.2d 443 (1951).

[53] See note 48 supra.

Rule 9 of the Revised Rules provides that, except as may be provided by special order, all civil cases will be called for argument and submitted in the order in which they stand on the docket. It further provides that at least forty-five days before the first Monday of each month, the clerk shall mail to each lawyer or firm interested therein a list of cases to be called during that month; and that on the assembling of the Court on each Monday, the entire number of cases set for the week will be called, with a view to the disposition of such of them as are not to be argued.

Rule 6 of the rules provides for the appellant's filing of his assignment of errors at least thirty days before the date when a case is set for hearing. This assignment "shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel." This rule also provides that "no error not distinctly assigned shall be argued by counsel, except upon request of the court, but the court may, at its option, notice a plain error not assigned or distinctly specified."

"The right of an appellant to obtain a review in this court of any ruling made in the trial court shall not depend in anywise upon his having filed in such court a motion for a new trial, or if such motion has been filed upon the grounds thereof being distinctly specified."

The appellant's main brief must also, under Rule 7, be filed and delivered at the same time. If appellant's main brief is mailed, there must be a certificate therewith that the mailing was done not later than two days before the due date for the filing. The same rule requires the appellee's brief to be filed not later than ten days before the day the case is set for argument, and the appellant's reply brief not later than three days before that date. The rule further provides that it: "Shall not apply where counsel have entered into a written agreement, filed with the clerk, relative to the filing of briefs, but no brief shall be filed after the case has been submitted, except by leave of the court first obtained." The rule also provides for the suggested form and style, and physical make-up of appellate briefs, and for certificates of delivery.

At this point, the broad authority of Sections 1958 and 1959 of the Code of 1942, should be noted. These sections have as their object the curing of defects in appeals by Supreme Court process, in order that appeals shall not fail because of defects and irregularities therein. Those sections read as follows:

> "May make all orders and issue process. The Supreme Court may make all orders and cause to be issued and executed all process

> necessary or proper to secure an appeal to it from any judgment or decree from which an appeal may be taken to the Supreme Court, and to compel the production before it of a full and perfect transcript of the record and proceedings in any case in which an appeal to said court is provided for by law, and of all papers necessary to the disposition of any case or matter properly before it."
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> "1959. Appeal not to fail for certain things. An appeal to the Supreme Court shall not be dismissed for want of jurisdiction because of a defect in the application for appeal, or in the bond, or because of any failure by an officer to comply with the requirements of law in reference to appeals; but all defects and irregularities may be cured by amendment, so as to perfect the appeal and obtain the judgment of the Supreme Court in the case; but the court may dismiss an appeal for a failure of the appellant to do, within a reasonable time, what may be necessary to perfect his appeal."

Of the second Section, it was recently said:[54]

> "This statute is broad in its terms and we should not limit its application to trivial defects and irregularities. It should be liberally construed in favor of allowing the case to reach final judgment on the merits."

Rule 21 of the Revised Rules should be noticed here. It provides that:

> "When any case shall be called for trial in its order, if no counsel appear and no brief be filed on behalf of the appellant, the cause shall be dismissed for want of prosecution."

Rule 10 of the Revised Rules concerns argument of counsel, providing that only two counsel may be heard for each party in a case, and also provides for the time allowed for argument, and its apportionment.

The Supreme Court may try and determine all issues of fact which may arise out of any appeal before it, and which are necessary to the disposition thereof, and may by order in each case prescribe in what way evidence may be produced before it on the issue.[55] An example of the application of that Section is found in *McInnis v. Simmons*.[56] There, the court received affidavits in order to determine whether title to a judgment on which the appealing execution creditor relied had been transferred to a third person.

Nevertheless, the appeal must be considered upon the record as made in the trial court except for such "issues of fact which may arise out of any appeal."[57]

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[54] Snipes v. Commercial and Industrial Bank, 225 Miss. 345, 83 So.2d. 179 (1955).
[55] Miss. Code Ann. § 1960 (1942).
[56] 162 Miss. 606, 139 So. 872 (1932).

Section 1962 provides also that if there is a reversal of the lower court's judgment, the Supreme Court shall render such judgment as the court below should have rendered, unless it is necessary in consequence of its decision that some matter of fact be ascertained, or damages be assessed by a jury, or where the matter to be determined is uncertain; in which cases, the suit shall be remanded for a final decision; and when so remanded shall be proceeded with in the court below according to the direction of the Supreme Court, or according to law in the absence of such direction.[58]

Rule 11 of the Revised Rules provides, importantly:

> "No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice."

Rules 12 and 13 authorize the granting of new trials as to part only where applicable, and new trial as to damages only, where applicable.

In case the judgment appealed from is affirmed, or the appellant fails to prosecute his appeal to effect, the Supreme Court shall render judgment against the appellant for damages at the rate of five per cent and costs.[59] The effect of an affirmance is simply to establish or confirm the validity of the judgment from and as of the date of its rendition in the court of original jurisdiction.[60]

The Code of 1942[61] requires the certification by the Supreme Court Clerk to the trial court clerk of each final judgment rendered by the Supreme Court within twenty days after the rendition of the judgment, if the costs accrued in the Supreme Court be paid to him. If the clerk fails to issue the certificate as required, he shall forfeit to the aggrieved party one hundred dollars to be recovered by motion before the Supreme

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[57] Graham v. Graham, 214 Miss. 99, 58 So.2d 85 (1952); Federated Mutual Implement and Hardware Insurance Co. v. Spencer, 219 Miss. 68, 67 So.2d 878 (1953); Wilder v. Currie, 97 So.2d 384 (Miss. 1957); International Order of Twelve v. Barnes, 204 Miss. 333, 37 So.2d 487 (1948); Adams v. Bounds, 224 Miss. 518, 81 So.2d 235 (1955); Martin v. Gill, 182 Miss. 810, 181 So. 849 (1938); Alexander v. Hancock, 174 Miss. 482, 164 So. 772 (1935); *Sugg. of Error Overruled,* 174 Miss. 482, 165 So. 126 (1936).

[58] Cf. California Co. v. State Oil and Gas Board, 200 Miss. 824, 28 So.2d 120 (1946); Holcomb v. McClure, 217 Miss. 617, 64 So.2d 689 (1953); Sperry's Estate v. Sperry, 189 Miss. 321, 196 So. 653 (1940).

[59] Miss. Code Ann. §§ 1971 - 1972 (1942).

[60] Mississippi Power and Light Co. v. Town of Coldwater, 168 F. Supp. 463 (N. D. Miss. 1958); Early v. Board of Supervisors, 182 Miss. 636, 181 So. 132 (1938); Claas v. Continental Southern Lines, 225 Miss. 94, 82 So.2d 705 (1955).

[61] Miss. Code Ann. §§ 1990 - 1991 (1942).

Court on five days' notice. The proper construcion of this section requires the Supreme Court Clerk to certify a final judgment within twenty days after any suggestion of error shall have been disposed of, or if none has been filed, that he then certify the judgment within the period so prescribed after the time allowed under the rule for filing a suggestion of error, or the extended time granted under an order of the court for that purpose shall have expired.[62]

The Supreme Court has the inherent power to correct a judgment it did not intend to render, whether at the term in which judgment was entered, or at a subsequent term, and this may be suggested by motion.[63]

"The losing party may within fifteen days after an opinion is handed down file a written suggestion of error of law or fact therein. Upon good cause shown this time may be extended to thirty days, but an application for such an extension must be filed within the original fifteen days."[64] This rule further provides that no reply to a suggestion of error shall be filed unless the court, by special rule or otherwise, shall call therefor. But no suggestion of error will be sustained to the prejudice of the adverse party until he has been given an opportunity of replying thereto. After a suggestion of error has been sustained or overruled by the court, no further suggestion of error shall be filed by any party. The Supreme Court will rarely consider a new contention on suggestion of error, despite the rule of court (Rule 6) giving the court the option to consider plain errors overlooked by the appellant.[65] In that case the court said, quoting from *Eady v. State*.[66]

"As a general rule it is no more permissible on appeal to present a case in halves or by piecemeal than it would be on the original trial."

There is no provision for a suggestion of error in the court's action on motions to dismiss or motions to docket and set for hearing.[67] The full court will consider a suggestion of error only in the absence of a unanimous decision and continued accord by the five judges hearing the case.[68]

The appeal bond and writ of supersedeas are items of considerable importance, and should be discussed here in more detail. Section 1163[69] of the Code of 1942, sets out the requirements for an appeal bond where a supersedeas of the judgment appealed from is desired. The bond must be given by the appellant, with two or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in the State, in a penalty of one hundred twenty-five per cent of the amount of the judgment or decree appealed from or one hundred twenty-five per cent of the amount of the value of the property or other matter in controversy, to be determined by the officer granting the appeal and conditioned that the appellant will satisfy the judgment or decree complained of, and also such final judgment as may be made in the cause, and all costs if the same be affirmed. A supersedeas shall not issue until such bonds have been given. Section 1188 of the ode of 1942, provides as follows:

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[62] White v. State, 190 Miss. 589, 195 So. 479 (1940); See Edmonds v. Delta Democrat Publishing Co., 221 Miss. 785, 75 So.2d 73 (1954).

[63] Sample v. Romine, 193 Miss. 706, 10 So.2d 346 (1942); cf. Gayden v. Kirk, 208 Miss. 283, 44 So.2d 410 (1950); House v. Russell, 210 Miss. 57, 49 So.2d 809 (1951); Chrismond v. Chrismond, 213 Miss. 189, 56 So.2d 482 (1952); Covington County v. Miss. Road Supply Co., 59 So.2d 325 (Miss. 1952); Hunt Oil Co. v. Berry, 227 Miss. 680, 86 So.2d 854 (1956).

[64] Rule 14, Revised Rules of the Supreme Court.

[65] Delta Cotton Oil Co. v. Elliott, 174 So. 550 (Miss. 1937).

[66] 153 Miss. 696, 697, 122 So. 199, 200 (1929).

[67] Johnson v. St. Catherine Gravel Co., 218 Miss. 713, 63 So.2d 393 (1953).

[68] Ryan Supply Co. v. Brett, 222 Miss. 30, 75 So.2d 721 (1954); c.f. Rule 35(5), Revised Rules of the Supreme Court.

[69] See also Miss. Code Ann. § 1170 (1942).

> "When an appeal shall be taken, and bond for stay of execution given, the clerk shall not issue execution on the judgment or decree appealed from until such day shall end or be discharged; and if execution had been issued before the bond for stay of execution was given, the clerk shall issue a command to the officer in whose hands the execution may be to desist from enforcing it, and to surrender any property seized under it to the person from whom it was taken or who may be entitled to it."[70]

Section 1208 of the Code of 1942, provides that in all appeals the court may on motion of appellee or obligee inquire into the sufficiency of the amount of the bond and of the security thereon, and may at any time require a new bond, or additional security, on pain of dismissal; and if any bond be defective, the principal therein may give a new one, which shall have the same effect as if given originally.

As provided in Section 1162 of the Code of 1942, where no supersedeas is desired or allowed, it shall be sufficient for the appellant to give bond to the opposite party, with sureties, as in Section 1163, in the penalty of five hundred dollars, conditioned for the payment of all costs of the appeal in case the judgment or decree be affirmed as to the appellant. However, if the appellant prepays the cost of the transcript, a bond for the sum of one hundred dollars shall be sufficient, or the appellant may deposit that sum with the clerk in lieu of the bond. But if the transcript is not prepaid and no supersedeas is desired, if the clerk of the court or any party to the suit shall apprehend that the cost of the transcript of the record and of the appeal will exceed the five hundred dollar sum, such clerk or party may apply to the trial court, or the judge or chancellor in vacation, and an order may be made fixing the amount of such bond for costs of appeal.

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[70] Miss. Code Ann. § 1188 (1942).

Appeals with and without supersedeas have the same effect, except that the former operate to stay execution.[71]

In *Sartin v. Barlow*,[72] it was held that appeals to the Supreme Court with supersedeas in civil cases are matters of right only under Sections 1163, 1165 and 1167, and then only in three classes of cases: (1) where there is a money decree or judgment; or (2) where there is a decree or judgment for the recovery or against the retention of specific property; or (3) where the decree directs the sale or delivery of possession of real estate.

Section 1169 of the Code of 1942, however, provides that:

> "In any case of an appeal to the Supreme Court, where no special provision is made by law for a supersedeas of the judgment or decree appealed from, or for the bond to be given in such case, a supersedeas may be allowed by the court rendering the judgment or decree appealed from, or by the judge thereof, or by the Supreme Court or any of the judges of said court, upon such bond, with such sureties as said court or judge may direct in the order for a supersedeas."

Supersedeas under this section is within the sound discretion of the court or judge.[73]

Affirmative injunctive relief, denied the appellant by the lower court, may not be granted by the Supreme Court under this section under the guise of a writ of supersedeas.[74]

Section 1970 of the Code of 1942, which provides that the Supreme Court shall entertain a motion to discharge a supersedeas in an appeal before the return day for the appeal, has been held to have no application to a case arising under Section 1163, as this section unquestionably grants the right to appeal with supersedeas.[75]

Sections 1165 and 1167, mentioned above as allowing as a matter of right appeal with supersedeas in the cases specified, provide respectively for supersedeas of a writ of possession in ejectment, with a bond in a penalty equal to double the value of one year's rent of the subject land; and conditioned, if judgment is affirmed, to pay all costs and the value of the use and occupation of such land after the time of taking the appeal, and damages for waste or injury to the land, not embraced in its use and occupation after taking the appeal; and for supersedeas of a decree directing the sale or delivery of possession of real estate. In the latter case, the penalty of the bond is double the value of the real estate to be surrendered, and the bond must be conditioned to pay all costs and damages, and not to commit or suffer to be committed any waste thereon, and to pay the value of the use and occupation thereof until the delivery of possession in case the possession is to be surrendered, if the decree appealed from shall be affirmed.

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[71] Yazoo and M. V. Ry. Co. v. Adams, 78 Miss. 977, 30 So. 44 (1901).

[72] See note 7 supra.

[73] Sartin v. Barlow, supra note 7; Orkin Exterminating Co. v. Posey, 218 Miss. 611, 67 So.2d 526 (1953).

[74] Mississippi Power and Light Co. v. Town of Coldwater, supra note 60.

[75] Coulter v. Banks, 207 Miss. 276, 38 So.2d 696 (1949); Cf. Mississippi Power and Light Co. v. Town of Coldwater, supra note 60.

In all cases not specially provided for, the appeal bond may be made payable to the State; and where it is provided that such bond shall be made payable to the opposite party, it shall not be an objection to the bond that it is not payable to the proper person, but such bond shall be valid and binding on the obligors, and may be proceeded on in all respects as if it were payable as directed by law.[76]

Sections 1209 and 1210 of the Code of 1942, provide for appeal with supersedeas without bond by certain classes of appellants. These embrace executors, administrators and guardians, who have already given bonds as such, though in such appeals to the Supreme Court the appellant may be required to prepay the clerk for the transcript of record. Also specified are: the state, and any county, city, town or village thereof, and the officials representing same, and any state, county, city, town or village officer who is a party to any suit or action in his official character, in which suit or action the state, county, city, town or village is beneficially interested, and the several incorporated charitable or educational institutions established and maintained by the State, and all corporate instrumentalites wholly owned by the United States Government.

It should be here noted that Section 1212 of the Code of 1942, provides that in all suits against the board of supervisors of a county or the mayor and board of alderman of any city, town or village, or any other board, commission or other officer of any county, or municipality or district in their official capacity, any taxpayer or taxpayers of the county, municipality or district shall have the right at his or their own expense to employ private counsel to defend all suits instituted as above and may prosecute an appeal to the Supreme Court from any judgment or decree adverse to such officer if same does not so prosecute within thirty days from the date of the rendition of the judgment. And if such officer should desire to dismiss an appeal taken by him, it shall not be dismissed if any taxpayer of the county, municipality or district shall object thereto, but the court shall retain the cause and render decision therein upon the issues presented by such appeal; provided, however, that such taxpayer shall enter into bond for costs as provided in Section 1213, and shall be liable for all costs of such appeal should said cause be decided adverse to him.

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[76] Miss. Code Ann. § 1168 (1942).

Section 1213, just referred to, and 1214 of the Code of 1942, provide that where a taxpayer shall so prosecute an appeal, he shall only be liable for the actual costs of the appeal, and that it shall be necessary in order to prosecute the appeal for such taxpayer to file a bond, approved by the trial court clerk, in a sum sufficient to cover the costs; and that in such taxpayer appeals, all notices required by law to be served on the court reporter or other officer shall be sufficient if served thirty days after the filing of the bond for appeal by the taxpayer.

The foregoing discussion, and authorities cited, have necessarily not been exhaustive of the very broad subject matter treated. However, the article should be a useful guide, in its chronological treatment, to the preparation and prosecution of a civil appeal from the Circuit to the Supreme Court of Mississippi, and should serve as a starting point for a more detailed development of any particular point.

PROCEEDINGS OF THE FIFTY-FOURTH ANNUAL MEETING OF THE

Mississippi State Bar

Held at Biloxi, Mississippi on the 12th and 13th of June, 1959

The convention was called to order in the Buena Vista Hotel in Biloxi, Mississippi, at 9:30 A. M., June 12, 1959, by Mr. Breed O. Mounger, President of the Mississippi State Bar.

The invocation was delivered by Reverend Father Patrick O'Neil of Biloxi.

An address of welcome was delivered by Mr. Jules A. Schwan, of Biloxi, and was responded to by Mr. Sherwood W. Wise of Jackson.

After the introduction of distinguished guests, President Mounger delivered the following address:

PRESIDENT'S ANNUAL ADDRESS

*Breed O. Mounger**

The theme of the entire year's work has been confined to two problems. First, the uplift of the individual attorney, as well as the Bar as a whole, and, second, the uplift of the attorney and Bar in public esteem. I have very cruelly said on past occasions that the first thing a man must appraise before the public will show him esteem, the very first thing he must be conscious of, is himself. Let us always be conscious of the fact that a client, if he is an educated and experienced man, well knows that if you can't take care of your own business with him, you certainly can't take care of his business with an adversary.

We have determined, too, that as a man continues his professional practice, he must realize that public esteem is based upon how well he has performed his tasks. There is a veil of protection afforded the man who is sufficient within himself economically. It is much easier for that man to indulge in the extension of the delicacy of ethics than the man who is not wealthy independent of his law practice. The man who faces you in a courtroom, your adversary, a fellow member of the Bar, and engages in unethical or questionable tactics is a man who is afraid, and has but one master, economic betterment. If a lawyer respects himself and preserves his economic situation, he cannot only be ethical and honorable, but he can be gracious with his fellow attorney. If he fails to preserve his economic situation, he has to reach out on the fringes, for he is afraid.

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*President of the Mississippi State Bar, Tylertown, Mississippi.

The economic well-being of the Bar might well be said to have begun in definite earnest with the administration of John Satterfield. During John's tenure in office and the tenure of M. M. Roberts that followed it, those men were able to bring up, statistically and accurately, the income of the lawyers of Mississippi some 13 per cent. Mr. Roberts followed John Satterfield with a great administration based on the same theme, and then Will Henley came along with his contribution. Those three gentlemen have brought our overall compensation up quite a percentage upon the national scale, from the very base and degraded low that existed prior to that time.

Despite the increases in income that we have noted, let us remember that the income of people in the other fields has also increased. The welder, the mechanic, the common laborer and everyone else earns more today, and they have out-increased us. That portion, though we have shown an increase, of the national income presently dedicated for legal services and which goes to legal service is some 25 per cent of what it was twenty-five years ago. In other words, though we have shown increases, we, as a profession, are taking approximately one-fourth as much of the national income as we did twenty-five years ago. Don't let that frighten you. We are all still doing pretty well.

You are going to disagree with the result of the study of your your committees and officers. Why, whoever saw a lawyer who wouldn't disagree? He is trained to resist logic and that is a good weapon; he is trained like a fighter. When you reach his mind with logic, he lashes back instinctively. That is what it takes to make a good trial lawyer or a good advisory lawyer.

My conclusions, and the conclusions of several of your committees, are to the effect that a complete specialization is an answer to your dilemma. We can prove it. First, pick the most outstanding and successful member of your Bar and when you have, you know where his success came from—he has specialized. He has dominantly handled one particular type or side of litigation. If you trace a lawyer's economic success and welfare, if it be great, you will find that if he is a country general practitioner or an urban general practitioner, then you must look at his investments; you will find his advantages obtained there, not from his professional accumulations. If he has an accumulation from his profession, if he has shown himself to have done well in your community and in your Bar, you will find that he has specialized, and that the public has received him on that basis.

So, as a second method of proving that today we need specialization, let us look to the activities of the medical profession, from which we could learn a lesson. Taking a look at the medical profession we find that the general practitioner disappeared almost twenty-five years ago. If a person has the toe itch the doctor will say, "Gee whiz, that ain't itching, is it?" He says, "Yes, it is." The doctor says, "Well, I'll have to send you to a dermatologist in Jackson, Mobile, or New Orleans." That fellow can't get a little salve for his foot. So he goes to the city and finds a sign board in front of the specialist's office which says, "Weinberger, Sternberger, Hafferty, O'Reiley, Lee, Smith & Jones." In other words, all religions and all nationalities are represented. They get you in and flip and flop you around and by the time they have finished you have spent $500.00. You say, "Well, they were driven to it by the intricacies of their science." That is not the reason they do it I tell you. It is so everybody can get a whack at you. You just lay still, little cat fish. This gentlemen over here is going to clean and dress you and that's all he's going to do. When he gets through, this one over here is going to drop you in some deep fat, fry you, and these three are going to eat you.

I am not trying to be inspirational. I am not saying I know a great deal about the practice of law, but I know this much—it is too big for me. I can't be a general practitioner and I don't believe the normal lawyer can; for it is so exceedingly difficult to do the study and maintain the library necessary for a general practitioner. Just stop and think of the specialized questions that arise in the office of a general practitioner and the specialized materials required to competently handle such business. A while back, from the standpoint of library alone, I realized I was spending more for my books than I was taking in, so I narrowed my work down and I have been very happy about it.

In order to direct lawyers into a more complete understanding of the practice of law, we had the Lawyers' Business Affairs Committee dedicate themselves from the instant we closed the last convention to formulating a law office manual, which gives a method of fee computation and provides information on every detail of handling a law office. That manual can save you a lot of money if you will observe and follow the taxation suggestions which show what you should do to get your legal tax avoidances.

One can turn to this manual when asked questions concerning estates, open it and hand it to the client to let him see what he is up against. The manual will indicate the minimum fee and the schedule or computation upon which the chancellor will render his decision. Then, if there is any special work or fee you'll never have any argument with them concerning the matter. By using the manual you can explain the situation to the client and thus better establish your public relations.

Based on a resolution adopted by this body and your Commissioners, you received, along with your Bar dues, a solicitation for such free will contributions as you were willing to make. Gentlemen, it was only because of your response to those solicitations that your Bar was able to function in a normal manner. At the present time the Legislature denies us the privilege of setting our own dues. I sincerely hope if you adopt a resolution this year to continue that process, and your Commissioners and Budget Committee have recommended it, that you will respond in the same manner. Your money is never frivolously spent. If you receive a request for additional funds this coming year, remember that is what it takes for the Bar Association to progress.

Your State Bar, Officers and Commissioners were called upon to join the fight against the "do-gooders and civil-righters in Washington." I hope that no man here thinks the Mississippi State Bar was professionally concerned about the right or wrong of this situation. I hope that you did not want us to be spectacular and shout defiance. It was up to your Bar to fight that problem on the basis of its true legal import and to use only the dignified weapons and tools of our trade, which was done. The theory of that legislation is this: They said that since in the decision of May 14, 1954, the Supreme Court proclaimed and established that decision as being the law of the land, and by being the law of the land, the Supreme Court said that segregation in public institutions, in schools, etc. was no longer the law, and since the decision said that every school must be integrated, and whereas certain individuals and officials have sought to defy it and to criticize it, now, therefore, let Congress memorialize the fact that it is the law of the land and declare it to be the law of the land. You can readily see, gentlemen, that they were seeking to destroy American constitutional government and American jurisprudence by substituting rule by fiat. Never could it be said under our system of jurisprudence that a decision of the Supreme Court or any court would be binding upon the nation as a whole forever. This was called to the attention of that committee and they sat with bowed heads. It was called to their attention that there was once a decision, though they had forgotten it, called *Plessy v. Ferguson.* It was followed by the *Gallagher* decision in 1893, where it was said that segregation of the races in separate but equal rights was the law. It was brought to their attention that if those decisions were the law of the land and if all persons had been punished who opened their mouths about it or assembled anywhere within a state to discuss it, or attempted to change it as you have today, then in such event it could have never been changed because everyone of you birds, black and white would have been in jail. There was no answer to that line of reproach. Therefore, it has been with dignity that your officers have joined that fight. I thank you all for this honor you have bestowed upon me and this ends my report to you of my tenure.

Mr. John M. Kuykendall, Jr. of Jackson presented the report of the Budget and Finance Committee. Upon motion and second this report was adopted.[1]

Mr. Leslie Darden of the Law Journal Committee was not present. No report was given.

Mr. K. Hayes Callicutt of Jackson presented the report of the Junior Bar Section. No action was necessary on this report.

Mr. Hugh N. Clayton of New Albany introduced Congressman Jamie L. Whitten of Mississippi, who delivered the following address.

ADDRESS OF JAMIE L. WHITTEN

I am sincerely pleased to speak to the Mississippi Bar Association. Believe it or not, I never intended to get in politics and never intended to stay in it. My ambition was to practice law. I have retained and have in my heart now the desire to practice law. I do recognize, however, that I have stayed in politics perhaps a little long to come back and effectively practice law. I could probably learn the changes in procedure, but I just don't know how in the world I could practice law where precedent does not mean anything and the Constitution has gone out the window.

It is during a serious time that I come here, and of all the groups in Mississippi I would rather talk to lawyers more than I would like to talk to any other group. What we face is a legal problem. These are times in which we must keep a cool and level head. I believe that if I turned my feelings loose, I could make you as hot a speech about the conditions we face as anybody you know, and I believe I could use about as many descriptive adjectives as the next fellow. But, that is one of the dangers we must avoid, in order that we may look at the issue cooly and clearly. In this situation which calls for cool heads, I am reminded of when I was a young district attorney trying a lawsuit in Senatobia. My opponent was Judge Frank Dean. My old friend Judge Kuykendahl said Judge Dean had an affidavit voice; anything he said sounded like he was swearing to it. He was a good friend of mine and in this case a Negro defendant had committed murder—that is the district attorney in me, that is the way I describe it—the defense lawyers said he was charged with having committed homicide. At any rate, in the preliminary hearing two witnesses testified and their testimony was recorded. When the court met and the grand jury convened, these two witnesses completely changed their story. As district attorney it was my duty, as I saw it, to have them committed to jail for perjury. We proceeded with the trial.

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[1] All committee reports will be found in Appendix A.

Judge Dean got up in the courtroom and said, "Gentlemen of the jury, Jamie Whitten, in my opinion, has been one of the cleanest, finest young fellows I have known. He has been my friend; I have been his. I am for him, but I want you to know that when, in his zeal to discharge his duty as district attorney, he puts the witnesses in jail for perjury so as to defeat their testimony in this case for my client, I want you to know I don't appreciate it." I have never been as surprised and shocked in my life. I am letting you down light about what he really said; it was much worse than that. I got so mad I couldn't see and walked outside the courtroom. As I got outside the courtroom, it dawned on me that I was doing just what he meant me to do. I went back in the courtroom, and when I argued to the jury, I said, "Gentlemen of the jury, you know what he is doing. He is an old, experienced lawyer; he knows that he is doing just what a lawyer who taught me at the University said to do. He said, 'Son, when you get out in the practice of law, if you haven't much evidence, bear down on the law; if you haven't the law, bear down on the evidence; if you haven't either one, give the lawyers hell.' I said, Gentlemen of the jury, Judge Dean has not mentioned law or evidence one single time." The jury went out and came in with a conviction.

My friends, this problem is serious to us. We need to step outside the courtroom, clear our thoughts and think how we are going to handle it. I am not going to belabor the issue by describing in high sounding language what has happened, but if we are going to handle this lawsuit, we have to determine where we are, how we got here, what we can possibly do about it. It is along that line that I hope to discuss several facts with you.

We have a Supreme Court that has taken unto itself the right to change the Constitution and that is bad enough, but in effect they have determined that they have a right to change it again from week to week and month to month. In effect, they have said that while certain statutes are constitutional, they reserve the right to see how they are carried out, to later perhaps declare them unconstitutional. In the history of governments and in the history of people, those governments have stood that had something solid around which the tides of public opinion could ebb and flow. In our country it was the Constitution, fixed and stable, around which statutes could be passed and decisions rendered. But when you take the Constitution and strike it down, and when you place it in the hands of a court from which there is no appeal, it means that from week to week you don't know what the law is. Recently, we saw France call General DeGaulle back. Why? It was because the French constitution was in the hands of a legislative body, which meant that they didn't have any stable constitution at all.

What do we have in this country? What does the Supreme Court's line of decisions mean? My friends, in describing the land on which this building is placed, the accuracy and soundness of the description depends upon where the marker of the first survey was placed. The Supreme Court has moved the constitutional marker about fifty feet and it destroys everything in turn which was tied to it; and, further, they have reserved the right to keep wiggling it around to serve their political purposes.

How did we get this way? We got this way from pure unadulterated politics. The politicians talk about civil rights. But, the first Negro who voted in any county or state didn't vote because somebody wanted him to have civil rights; he voted because some politician wanted his vote to win. The next time the other side registered a few more Negroes and it has finally reached the point where both parties are absolutely controlled by the Negro vote. There are no civil rights involved in it, just poor down to earth politics.

The situation in this present day is primarily this: when President Eisenhower was elected, a man of practically no political experience at all, he brought into his cabinet Mr. Brownell, a racial, politically experienced genius who had played the colored vote of New York City for many years under Dewey. Then, about the time he brought Mr. Brownell in, a vacancy occurred in the position of Chief Justice. Here we find Mr. Warren in California, a governor who had the support of both parties, who was also an expert in racial politics, being considered for that position. Mr. Warren, when he was Governor in California in 1952, granted an interview to the *U. S. News and World Report,* and you will find that interview in the May 2, 1952 issue. He was asked how he stood on civil rights. At the time he thought he might be the presidential nominee of the Republican party, which, for the last two elections, had condemned segregation and the restraining of the exercise of what was termed civil rights. He says, "As a Republican governor I am bound to the platform of the Republican party, which means I must use all the power at our command to get rid of this evil of segregation . . . ." That was published all over the United States. That man was appointed Chief Justice. When they appointed him, even with that record, they sent Mr. Brownell out there to see him and the presumption is that they wanted assurance. After that public statement, I can't see what assurance they needed.

You say, Congressman, Mr. Warren was just one member of the court. How did he get all the other members to concur? My friends, I think, and I have many reasons and much evidence to support me, that he used the threat of Russia to bring about the unanimous decision by the Supreme Court. He probably said that if we don't bring about this equalization of rights and integration of the colored people in the

United States, we will lose the contest with Russia throughout the world. He said that if we don't do this, Russia will gain strength and conquer us. Why, it was said that if Russia takes over here, the first thing they will do is set up a dictatorship. If Russia takes over, they will do away with the right to trial by jury. So what did they do? They beat the Russians to it by using the threat of Russia. You have seen the President recommend, and a majority of Congress pass, the law taking away the right to trial by jury. Yes, they said we would have a system similar to Hitler's in Germany or Stalin's in Russia. What did they do in Germany and Russia? What was the source of their absolute control of those nations? Why, they had the courts issue decrees, then they used troops to enforce the decrees. What is the difference there and here? We see the Supreme Court change the Constitution and the President send the troops in to enforce it. Why, we beat Russia to it.

They say we have got to integrate the United States or else we can't hold India, China and Japan. If being all the same color would work, why have China and Japan been at daggers point throughout history? Talk about civil rights in India, where people of the same color can not even touch each other. No, the trouble is right here at home. People are using the threat of Russia here in the United States to accomplish their personal wishes. My friends, if this was the real McCoy, if the proponents of this destruction of our American way of life and the pride in our race were honest, they would look south of us and wonder why South America, Mexico and Central America, with the same great natural resources as North America, have such a low economic level. They would wonder why their elections are determined by violent revolutions. If John Marshall had been as smart as Justice Warren, and if Thomas Jefferson had been as far-sighted as the President and had brought integration about in their day, perhaps, by this time, we would be on an economic level with South and Central America.

This whole problem was born in and it will never be handled outside the political arena. If you go into Harlem at night, you take your life in your hands, and you may be in danger in the daytime. Congressman Celler is from New York, don't you know he is aware of the situation? You can't go to certain areas of Chicago without danger to life and limb, and some areas of Washington are dangerous at night. This all started in an effort to get the Negro vote. It is still tied to the Negro vote. I hear some of my friends at home say, "Oh, if the people of the North just knew." My friends, they know better and have known better all along. And, after all, it is not the people pushing integration, it is the politicians trying to be re-elected. If we would agree to accept every civil rights bill that has been introduced, or that they can think of now, it wouldn't solve anything, because they would come up with some new ones before the next election for the same purpose, which is to get the vote at home.

The solid southern type of people have kept the balance in national affairs many years. We used the filibuster in the Senate to stop dangerous legislation and used the power of the chairmanship in the House and Senate to do the same thing, but it has gotten away from us. When it was evident that civil rights couldn't be stopped with the filibuster, without losing the right of filibuster that in itself showed that the approach would no longer work. If you can't use it for that purpose, what are you saving it for? What difference does it make to be Chairman of the Committee on Education and Labor? What good is a chairmanship when they stack the committee against you 20 to 10? If you block them in the middle, they run around the end.

Our problems are due mainly to our deteriorating influence in national conventions and in the Congress, in spite of the fine quality of people with whom I work. Since these things are promoted by politicians to obtain votes in their district, you are going to have to make them have the same interest in holding or getting the votes in the South. Let's be honest with ourselves. I am proud of Mississippi. We have the brightest future, and we are making the greatest progress of any section of the United States. But, be honest. In the whole State of Mississippi we have about as many people as there are in South Chicago. So, when we try to handle this lawsuit, we have to recognize that fact. Soon after I was elected district attorney, I went to DeSoto County where a deputy sheriff had shot the son of a prominent physician; it was a terrible situaton, but it was the sort of thing that happens from time to time. In my race for election, knowing they had two able lawyers from DeSoto County running against me, I didn't go there since time was short, and I got 4 votes in that county. But I was elected anyway. When I got there the County had taken sides in this situation. I had two delegations to call on me, one for the defendant and one for the prosecution. They told me I was young and could look ahead to a wonderful future in that county, but if I knew what was good for me, I'd do what they said. Then the other side came and told me the same thing. You don't have this opportunity often. I listened to their advice and said, "Well, I want to say, my friends, I was making a good living practicing law and I don't have to be district attorney. I don't believe anybody can threaten me with politics, but if they could, they couldn't do it with 4 votes.

One of the most difficult things we must face is to have sufficient patience to gain enough support in the South to count. That can be done. I know it is easy to cuss everybody out, go fishing and vote for the next door neighbor, but what does it gain? It does not gain anything. There are three things, as I see it, that we can do. And, as I see it, next year we are going to be faced with these three things, and I tell you why we will be faced with them. The Republican Convention of 1960 is almost certain to endorse the actions of the Supreme Court, and the actions of the President in sending troops to Little Rock. If the Republican Convention does that in 1960, it is almost assured that the Democratic Convention will go them one further. I am opposed to multiple parties except when we are forced to use them. I saw France and I know the dangers incident to the multi-party system. But, if the two national conventions endorse the Supreme Court action and the using of troops to enforce court action, how, in good conscience as Mississippians, can we stay in either house? Now, if that happens—and I am speaking from the heart and telling in detail some things which are not generally known—there are two courses open: we can have independent electors or a third party ticket. I supported my good friend Fielding Wright. He was one of the finest men and best friends I ever had. But I differed with him in 1948, in that I thought independent electors would be a more effective method by which we could accomplish our purpose. The decision was made; we went the third party route, and I was 100 per cent for it. But, each state in the third party wants one of their men to be the presidential nominee, and in the states which are left out, support for the third party wanes. Therefore, it would seem that independent elctors are the best approach if the time comes when circumstances force the people to join us. Nobody wishes to do this, but I say to you, it seems that we are going to be forced to do it. I know I am speaking to a legal group. I know you are thoroughly familiar with our system, but we do vote for electors. There is nothing in law binding those electors. It is a moral obligation. The electoral college meets about a month after the election. We could select our best people in Mississippi as electors to go to the electoral college and do the best they could. We could get other Southern states to elect their best men for the same purpose. Then you avoid this competition of who is going to be the presidential nominee.

As the electoral college now stands, the states you readily recognize as southern would have some 140 or 150 electors out of a total of more than 500. Am I telling you we can absolutely control the election? No. But in a particular election neither party will know but what you can control it that time, and they will bid for your vote each and every time. This problem is not limited to color or integration. If a court does what the Supreme Court has done, it means that we no longer have stability in our government; we no longer have anything around which the tide of public opinion can ebb and flow. We have taken one step toward the unstable conditions that exist in other American countries to the south of us.

You say, Congressman, you talk pretty big, but what are we going to do about Little Rock? I never knew an easy answer to a tough lawsuit. I am not trying to tell you I know an easy answer, but I do know we need to approach the problem cooly and look at it objectively. I know what we could do about a situation like Little Rock that they didn't seem to do. We could refuse to give them one ounce of cooperation. We don't have to do as they did and hire a superintendent of our public schools because he has already had experience in integration. No, if our people refuse to cooperate first, last, and always; if the teachers don't ask the first question or grade the first paper; if they have to sue for classes, grades, and diplomas; if our teachers are with us and we are united; I don't believe there is a court or president that can run the day to day detailed operation of a school; and, I don't believe there is any parent who will let children sit in a school all year and learn nothing and get no credit. I do know, my fellow Mississippians, that the relationship between the races in Mississippi has never been tied to law. The Supreme Court says you can't do it by law. My friends, we never did do it by law. The races have existed peaceably in Mississippi because of the understanding and knowledge of our people. It has been mutually to our best interests. We have done it and can still do it. I know outside educators are going to try to come here and agitate. Not because they care for the Negro but because they can print it in northern papers and get votes on election day.

A so-called civil rights bill has passed and there are many dangers in it, but it is primamily directed toward Negro voting. If we in Mississippi follow a proper course of action, there will be precious few Negroes voting in Mississippi on their own initiative for many, many years. But, if in any county election one side attempts to solicit and register the Negro vote, the next time the other crowd will raise their bid and register more than they did. If we follow that road, we will be absolutely controlled by this minority vote just as the two major political parties are today. Some reports indicate that it has happened in four or five Mississippi counties already. We must be temperate and wait until we can get enough strength to count. The place to win this lawsuit is in a solidified Mississippi working to induce the other states to join us in the fight. But, may I say, if these two National conventions do as I am afraid they will, it is my opinion that if 25 younger non-chairmen in the House of Representatives, and as few as 6 Senators will pledge themselves to go the limit, then you can make every Southerner sign a resolution supporting our position or force them to run on the Brooks Hayes ticket. It is in the hands of the people of the South. Don't think it is necessary that we integrate to get industry here; it is not. I have listened to people all over the United States, and there are more industries interested in coming into Mississippi because of the way we run our affairs than there are those who would stay out. Don't say we must give in to get federal aid for education because that is not necessary either, and you can't get aid without later getting control. Let's be strong, let's recognize that our forefathers, who went through reconstruction, wouldn't sit on their hands with 140 electoral votes, 106 members of the House and 22 Senators and say we are helpless. We can't afford to do that. If we do, fifty or a hundred years from now, we will be settling our elections by revolution and our economy will have declined to the point that we will be wondering how we will eat.

It is a pleasure to be here, and I welcome the opportunity to spill my heart out on this situation.

FRIDAY, JUNE 12, 2:00 P. M.

President Mounger presented an award to Mr. Kenneth Toler, Mississippi Correspondent of the *Memphis Commercial Appeal,* as the reporter who did the best job of fairly reporting the activities of the Bench and Bar during the past year.

Mr. Quitman Ross of Laurel presented the report of the Procedural Reform Committee. Upon motion and second each item of the report was voted upon separately. Upon motion and second the first recommendation failed. Upon motion and second the second recommendation was adopted. The third recommendation was incorporated in Item II of the report of the Study Committee by agreement. Upon motion and second the fourth recommendation was tabled.

Mr. Bidwell Adam of Gulfport presented the report of the Memorial Committee. No action was necessary on this report.

Mr. John A. Travis, Jr. of Jackson then introduced Mr. Alfred S Julien of New York, New York, who delivered the following address.

ADDRESS OF ALFRED S. JULIEN

I want to tell you, ladies and gentlemen, how honored I am by this invitation to address the Bar Association. I have noticed an outstanding feeling of congeniality and friendship amongst the members of this group. I have addressed some twenty-four Bar Associations throughout the country. In the course of those travels I have had an opportunity not only to attend the Bar meetings, but wherever possible I went to the local courts to see how the attorneys were handling their cases.

The changes are phenomenal and the differences in practice are yearly diminishing. The type of trial lawyer whom we knew in years gone by is rapidly passing. The prototype of the modern-day trial lawyer seems to be the quiet man, and perhaps this is something that we ought to regret. I personally regret it for one particular reason. I have recently seen a decision from the Circuit Court of Appeals, Second Circuit, concerning an attorney who used to weep copious tears in the course of his summation. He would flood the courtroom. It seems that this attorney, in a personal injury case against a railroad company, had wept such copious tears during the course of his summation that the principal, indeed the only, point on appeal, was the fact that the tears of counsel had so permeated the atmosphere of the courtroom as to prevent the defendant from receiving a fair and impartial trial. Said the Court of Appeals: "If counsel has means of shedding tears during the course of his summation he has the constitutional right to do so, and furthermore, having these means, if he fails to exert it, he may indeed be guilty of malpractice." I am sorrry to say that the weeper is gradually passing from the trial scene. There is another type of trial lawyer whom we are seeing far less frequently than before. That is the belligerent finger-waver, the destroyer of the witness. You don't see much of him any more and I don't know why. I have a class at the New York Law School which I teach once a week and the topic is "Trial Technique." I have tried to teach them never to crossly cross-examine but just saying that, and making a principle of it, doesn't seem to accomplish the purpose. However, I have brought to them and similarly I bring to you a brief transcript of a case where a man crossly cross-examined, and if you are prone to use cross and belligerent cross-examination, you might very likely re-examine your technique, having heard this transcript and what happened in this actual case. Let me orientate you about the facts of the case. This is a patent infringement case. It involves an alleged infringement of a patent for a beaver trap. The defense has called an expert, a professor of zoology, and the plaintiff's lawyer in the morning session had been cross-examining him at length, with very little success. By the time the noon recess came he was completely mad at this witness and he went out; and, being the sort of man who can't eat on an empty stomach, he drank his lunch, and came back to the court room loaded for bear—he is going to get the witness, and this is what happened.

The Interrogator: Professor, you say you are a professor?

Answer: That's right, that is, a form of professor. You see, I retired in 1915. No, it was really 1916. Pardon me.

Question: That's all right, Professor. Professor of what, Professor?

Answer: Zoology.

Question: What is that?

Answer: Zoology.

Question: Yes, but what is zoology? Don't evade or quibble.

Answer: I am not quibbling.

Question: Oh, yes, you are. Yes, you are. Just like all the so-called experts.
The Court: Treat the witness fairly.
(Now here is an answer you have heard many times.)
Counsel: I have practiced in this court for twenty-nine years and no one has ever accused me of treating any witness unfairly.
The Court: Proceed.
Question: What do zoologists do, Professor?
Answer: They study and they sometimes teach animal life. It is a bit difficult to define in a sentence. There are many various branches and specialties. It is the study of animals and animal life. I knew one professor who studied the snail family for thirty-five years.
Question: What was his name?
Answer: Albert Taylor.
Question: Where is he now?
The Court: (Somebody has awakened His Honor.) What has this got to do with this matter? I am afraid you are wandering a little far afield. (Here again is the classic answer.) Your Honor forgets this is cross-examination."
The Court: I forgot nothing of the kind. Get along with your questions.
Question: Answer the question.
Answer: What is the question.
Question: Strike it out. We will start all over again and I will put my questions in such a simple, child-like way, so simple and easy that even a so-called professor who studies snails and beavers can answer.
Opposing Counsel: I certainly want to object to these remarks.
The Court: Yes, that is very objectionable. I know this is cross-examination but get down to the meat of the thing.
Counsel: Very well, Your Honor.
Question: So you say you are a specialist, an expert on beavers, beaver traps and snails?
Answer: I didn't say any such thing, sir. I said I know a great deal about beavers just as I know a great deal about many animals. I have lived with them, I have—I was almost going to say I have conversed with them. You see, they have a sort of language. The worst thing you can say about them is that they are dumb animals.
Question: You say they can talk?
Answer: Well, there is a sense in which all nature has a language and we who study it can understand it.
Question: Answer the question.
Answer: What was your question?
Question: You said a beaver can talk?

Answer: Please don't try to make me look ridiculous. What I said was this: all animals can speak and by that I mean they can communicate with one another and understand their own language.
Question: Can you talk it?
Answer: I can answer it this way . . .
Question: Answer yes or no.
Answer: Yes.
The lawyer to the court reporter: I want you to get this. This is good. Get it.
The witness: I was going to say if we were to make an analysis that even plant life has a certain language.
Question: You talk that, too?
Answer: As I said before . . .
Question: Now don't quibble. Answer yes or no.
Answer: On the subject of what I said before, I will answer yes.
Question: Did you ever talk to a buttercup?
Opposing Counsel: Now, Your Honor, this is too much.
Counsel: He is your witness. He is your witness. You are bound by his testimony.
Question: Did you ever talk to a buttercup, Professor?
Answer: Well, to those who are familiar with them and have learned to love them, flowers have a certain language.
Question: What did the buttercup say to you? What did you say to the buttercup—and fix the time and place.
The Court: You don't have to answer that question.
Question: Well, did you ever talk to a giraffe? Answer yes or no.
Answer: Yes, with qualifications.
Question: Did he talk to you?
Answer: Yes, as I have stated before.
Question: Did you ever talk to a skunk?
Answer: Yes.
Question: Well, the next time you talk with one of those bastards, ask him for me, "What's the big idea?"

I am sorry to say this, but the record indicates that at that point our friend was jailed for contempt of court. You don't see them any more. Instead, you see the more or less quiet trial lawyer who does a business-like job in a business-like way.

Before we get down to questions of products liability, let me call a very important case to the attention of you gentlemen who are doing personal injury work on either side of the fence. A recent case in New York heard in the Court of Appeals was *Ferrari v. Valuce*. The case involved a young lady who had some type of shoulder injury. She received x-ray radiation treatment for it and evidently she was over-exposed because certain burns developed. The first doctor sent her to a second doctor and he treated the burns, but they did not seem to respond to treatment, whereupon the second doctor made a rather important mistake. He said, "You have got to return to me every six months, because if radiation burns fail to respond to treatment in this fashion, there is always the danger of cancer." From that moment on, she lived with cancer —she never got it, you understand, but she lived as though it were a real thing with her. She ran from doctor to doctor, from clinic to clinic, and sought every kind of quack remedy. Nothing happened, but the pain, the worry, the concern on her part and on the part of her family were just as real as though she had this dread disease. The doctors called this "cancer phobia." Watch that term—"cancer phobia."

They tried the case in two sessions, to insure that the question of cancer phobia would not impair the damages concerning the original injury. The case went to the jury for two verdicts, one with respect to the first injury and the other with respect to the cancer phobia. The jury found for the plaintiff on both counts, $10,000 for the first injury and $15,000 for the cancer phobia. The case was appealed to our Court of Appeals and it was affirmed. Personal injury men on both sides of the fence, what are the vistas that this decision opens to you? What important elements does this bring to your attention? If there can be cancer phobia, can there not be a diabetic phobia?

I have a little dog back home. He likes everybody except the milk man; suppose he takes a nip out of the milk man and runs away. We can't catch the dog. He can't be examined. The milk man is the sort of man who will not take injections for hydrophobia, but he worries and he worries about this bite until he finally begins to woof like a dog. If there can be cancer phobia, why not this kind of phobia? This is an element of damage which a lawyer on either side of the counsel table must know about so that he can reckon with it as an element in the case. Also, before we talk about products liability, I want to call your attention to some of the drugs which are having side effects on their users. In my state we have what is known as Products Liability Exchange. It is a bureau of information where each of our 7,500 members of the Bar Association, file information on claims which they have regarding specific items, or specific products, and this information is exchanged among the membership. One of the things which came to our attention while that system was in progress was that there was a particular drug called "marsilid" which was given to patients who were in a depressed condition and which was causing hepatitis, and, indeed, causing deaths throughout the country. I wish you could have been present when there was a convoking of some ten to twelve lawyers from throughout the country who had claims involving this problem. They sat down and of course discussed what had to be done with respect to the prosecution of their individual claims, but over and above that, in the public interest, 80 per cent of their time was devoted to the problem of how to prevent other members of the public from receiving this result from the use of this drug in its present dosage. As a result of their activity, that drug was changed in its dosage, and was for a time withdrawn from the market, and has now been returned with new ideas as to how it should be administered to patients. The important thing is this: the attorney handling personal injury work must realize that there are drugs, like cortizone or ATCH, which have side effects, and knowing of the side effects, he can watch for them. You can talk to the doctors in your case about them so that if they have materialized, this, too, can be a proper element for compensation.

As a result of this compendium of information which we have acquired with respect to claims in actions filed throughout the country, a number of things have been brought to our attention. I would like for you to familiarize yourself with this because products liability is the most voluble field in personal injury work at the present time, and you men who are not presently in it are going to find that you will be called upon to use your abilities in this field within the next five to ten years, because it is a growing field. The public is becoming aware of it. More and more cases are devoted to working out the law in this area. Let me tell you about some of the major categories coming to our attention as a result of the filing of these claims. In the field of automobiles there are cases and claims made with respect to most of the major causes of injury and they involve defects in steering apparatus, failure on the part of the braking system, broken axles and sticking gas pedals. Also, there are claims with respect to the apparatus that is used in cars: the tires, the glass, or the alleged shatter-proof glass, where it is not shatter-proof. The alleged puncture-proof tires which are not puncture-proof have been the subject of claims. Then you say, "Perhaps we ought to stop using cars. Maybe it would be safer to stay on the golf course." We have you there. There is a case involving failure of the braking system on a golf cart. You say, "well, perhaps we will stay away from that type of thing and stay at home to mow the lawn." The new rotary blades on lawn mowers have been the subject of many claims throughout the country on the basis that they are not properly guarded. Toes, here, there, and everywhere have been sheared off and are the subject of lawsuits and claims. You answer, "Then we will leave the lawn. We will leave the golf course. Let's get dressed and go out somewhere with our wife or girl friend." Here again we run into trouble. There are cases involving defects in the construction of shoes. There are cases where inner garments, girdles or other articles of feminine wear have resulted in severe cases of contact dermatitis. There cases of fabrics which have not been treated properly so that they burst into flame immediately upon close contact with matches or cigarettes.

"Well, let's not go out," you say. "Let's stay home and play with the children. We will look at their toys." Since this is the missile age, some of the toys are missiles of the projector type, and the box reads, "Absolutely Safe." Indeed, the box is absolutely safe, but the toy itself, its sharp edges, its projector devices, are injuring the eyesight of children throughout the country.

By this time you are so nervous that you are lighting a cigarette, and you know about some of the risks of cigarettes, but did you know that there are claims on file about cigarettes that have exploded and Hershey bars which had wire in them? There was one case, *McWhorter v. The Food Fair,* where they found worms in the food. The defendant said, "Well, we can't be held liable for that. Why, there is an area in this country, in Mexico at least, where worms and snails are a delicacy. They love it." Said the Court: "It may be a delicacy, but we have not yet joined the snail set." Verdict for the plaintiff.

What is the trend in public liability law? We were troubled for many years with the question of privity of contract. Privity of contract was somehow saddled onto the law of warranty, but warranty, if you trace it back to antiquity, had nothing at all to do with contracts, but began in tort. It had something to do with representations, fraud and deceit. Somehow in the United States, following a bad decision called *Winterbottom v. White,* we decided to call this privity of contract, but we are getting away from it now. The first important case is *Rogers v. Toni.* Toni is a home permanent advertised throughout the country as gentle and safe. Mrs. Rogers, who believed it was gentle and safe, somehow got an unwarranted crew cut when she used the commodity. She decided it would not be fair to sue the little drug store people who sold it to her, with whom there would be privity of contract. She wanted to sue Toni, who advertised nationally that their product was "Perfectly safe and gentle." The Supreme Court of Ohio said the manufacturer of a commodity who places a commodity on the market, advertises its potentialities, its safeness, its characteristics, is creating the market for the commodity. Having created it, the manufacturer must stand by his product. It is not the local man in the drug store who makes these representations. Since it is the manufacturer who is liable, we have leaping warranties. Recently, in the case of *Arfons v. Dupont,* this same leaping warranty was applied to a case where it was claimed that dynamite fuses were safe. The ultimate consumer was there permitted to sue the manufacturer of the commodity and it was held that the representation ran to the ultimate consumer. It is not important whether you classify your case as breach of warranty or negligence when you sue the manufacturer because the courts themselves are somewhat loose in their delineation of whether it falls in one category or another, but they are gradually coming to the realization that the ultimate consumer needs protection and that the manufacturer must stand by its product.

Then we get into the area of allergies. We used to think, and it seemed to be the law, that if a person had an allergy which caused a hypersensitive reaction to a product, you could not hold the manufacturer for the injury. It isn't his fault. He has a product that the general public can use. Why hold him responsible for an unusual idiosyncratic result? But that is no longer the law. In *Wright v. Carter Products,* the commodity involved was Arrid, which is a deodorant. It seemed that Mrs. Wright had been using his deodorant for some five years with no untoward results whatever. Then she began developing a rash. She discontinued using the product. When the rash had disappeared, she once again started to use it and she developed a very severe case of contact dermatitis. Said the defendant: "She has an allergy." Said the plaintiff: "I admit I have an allergy, but have you had any notification that others have suffered in this fashion?" Well, the defendant admitted that in 300 odd cases out of 8,000,000 jars sold, a similar result was suffered. The court held that if there is a class of people, however small, who can receive this result from your commodity, you must warn them by putting it on your product.

As a result of the decisions in these cases, the manufacturer will use greater care in the future, and the public at large will benefit as a result of the activity of the individual lawyers who tried those cases. These lawyers, not only on the plaintiff's side, but on the defendant's side as well, are working out a code of health practices, of safety practices, of fairness in advertising, of fairness in labeling, which if not done in court is only done in part elsewhere. It is too much to expect that the Pure Foods and Drug Administration can do a job like this by itself on a small budget. One other case I must call to your attention went much further than the majority of cases have thus far gone in the field of products liablity. That is the case of *Brown v. Roux,* a hair dye case. It seems that hair dye contains a coal tar derivative and that there are people allergic to it. Mrs. Brown contracted a disease known as periarteritis nodosa which is a rare and sometimes fatal disease involving the arterial system. This was the first time in medical or legal records that this colossal result had occurred by of the application of a hair dye. The defendant said, "Well, we knew that there could be some type of allergic reactions, but how could we foresee that this unusual and heretofore unknown result could be obtained?" The court said, "You need not expect and you need not know the particular type of systemic result which your product may cause to an allergic person. It is sufficient for our purposes that you know that there can be a systematic and serious result from the application of your product. Knowing that, there is a duty to warn." Liability was found in that case.

Whether the other courts are going to go quite that far, I cannot say. I bring it to your attention so that you will know the extent to which some of the courts have gone in what seems to be almost complete liability for the manufacturer of a product. Many of you will be attorney for a defendant who will say: "We are observing the standard form of conduct in our trade." In the bottling cases, the bottler may say, "The efforts we make to insure that we are using safe bottles is a standard procedure in our trade." It used to be that standard procedure could be a complete defense. But, it is no longer a complete defense. Now it is simply to be considered by the jury with all other evidence in deciding whether the defendant has used reasonable care. The courts say in effect, "No one can be his own defense. It is simply to be considered by the jury with all other evidence in deciding whether the defendant has used reasonable care. No one can be his own referee. No one can be his own umpire and if any industry can by its own agreement decide that standard procedure is as far as they will go on safety practices and no further; then there can be no progress." Therefore, a bottler, for example, if he knows about a test called the kaleidoscope test which shows up defects in bottles by color prisms, must let the jury hear about it. There may be a question of fact as to whether or not he ought to be using that test in his bottling process.

Finally, what is the extent of care which must be used in the form of notification of dangerous agents which are found in a product? *Caberlee v. Reard* is a case involving Bondex, a paint that contains calcium oxide which when dropped in the eye causes instantaneous blindness, Mr. Caberlee was using the paint. His little son was nearby and a fleck of the paint dropped in his eye and caused blindness. The manufacturer claimed that sufficient warning had been given. The warning read: "Caution. Inasmuch as Bondex may be irritating to tender skin, avoid excessive or prolonged contact with the skin." The plaintiff contended that the warning was not sufficient in that it did not warn how really dangerous the product can be to the eyes. The court said it is a question of fact: "Even if there is a warning, is the warning adequate considering the dangers of the commodity?" These are some of the aspects that you as public lawyers as well as lawyers for private litigants must consider in your work, for you are also doing safety work for the entire community. Since I call you "public lawyers," let me say one final word touching our duty as public lawyers. We have an ever greater duty, because we alone speak for the preservation of the jury trial and this is a matter which no longer respects state lines. We used to think that if there is an attack on the jury trial in one area that other areas are completely safe. This isn't true any more. Ideas have a way of leaping across state lines. In the state of New Mexico they have lost the right of jury trial in one aspect of their law, where they formerly enjoyed it. In the state of California there is a bill before the Legislature to do away with the jury trial in automobile cases. This is not the problem of the plaintiff's lawyer alone; it is not just the problem of the defendant's lawyer; but, if you cherish our adversary system, if you believe as I do that jury trial is the fundamental pillar of our democracy, then it is not sufficient that you resist attacks made directly upon the jury trial, but you must also resist the subliminal attacks which are being made. The subliminal type attack on the jury trial is under way. I want to call it to your attention so that you will know how to deal with it if you feel that our adversary system serves the public properly. There are two ways in which it is attacked. First, it is attacked by propaganda claiming that juries are giving away too much money. It is said that verdicts are excessive. It is said if that continues the public will ultimately feel the need that I, as a juryman, will have to consider my pocketbook and therefore cut my award when on the jury. They will say, "The jury system can't be trusted. If this sort of thing goes on, let's do away with it entirely." That is the vice; that is the danger and that is the objective of the propaganda concerning excessive verdicts. If a jury on a rare occasion goes haywire, why doesn't the judge set aside the verdict? If he fails to act, doesn't the appellate court give a remedy? However, the public doesn't know these things and it is being led to believe that juries are undesirable. Millions of dollars are being spent to bring this before the public. That is subliminal propaganda.

There is another phase of subliminal propaganda about which I want to alert you. It is the medical panel. Many people favor it, but they don't realize what it means. The impartial medical panel means that a segment of what formerly was for determination by the jury is now no longer for its consideration because an impartial specialist, the court's doctor, appointed by the court, is going to decide these questions to a certainty in a field where there can be no certainty. There is no certainty in medicine and there is no certainty in law. How can there be an impartial doctor? There are honest doctors. There are doctors of great integrity, but each of us is conditioned by the school of medicine, or by the school of law with which we have been affiliated. We are conditioned by our own thinking; we are conditioned by our background. Consider the example of a herniated disc. On the same impartial medical panel there may be one doctor who says, "I can't find a herniated disc unless a puncture dye is put into the spinal column. I can't make a diagnosis of a herniated disc without that procedure." There are other doctors just as good, just as honest, just as high-minded who say, "That is dangerous. Dye is sometimes left in the canal; the puncture itself is dangerous. It causes more injury than the original injury. I can find a herniated disc just by clinical examination." Both of these doctors can occupy positions on an impartial medical panel. The lottery number you draw will determine who the court's doctor is that will tell the jury how to find in your case. This system is not healthy. It is eroding the jury system. There is one other trend that judges in particular ought to know about. If the testimony of the court's doctor is rejected by the jury, then the court itself is partially rejected because the doctor is introduced as the court's appointee. When the doctor is rejected, the court is rejected, and when that happens the administration of justice suffers. Don't buy the impartial medical panel. It isn't working beautifully in New York.

Someone said that the jury trial is a small miracle of democracy in action. That miracle of democracy in action requires complete vigilance on our part, not for our own sake, but for the public whom we represent. As long as we are vigilant the adversary system as we know it is here to stay.

Judge Tom P. Brady of Brookhaven then introduced Senator James O. Eastland of Mississippi who delivered the following address.

ADDRESS OF JAMES O. EASTLAND

My friends, I greatly appreciate the very kind and very fine introduction, which I do not deserve, that I have just received from my good friend, Tom Brady.

As Tom told you, there have been some groups in this country that have been sniping at me because of the position that I hold. I am not going to get too controversial today—and I am controversial. We have a civil rights fight shaping up. It is a fight that in my judgment will determine the future of the American Government. If we sit here and permit power to be concentrated in Washington, and permit the reserved rights of the states and the people to be destroyed, then that system which was handed down from Magna Carta, upon which human liberty and Anglo-Saxon civilization have been founded, will be swept by the board. In that fight, I am going to do my best. I want to say that my friend, Jamie Whitten, made some recommendations, and as far as I am concerned no citizen should be or is obligated to support any candidate or political party which is bent upon the destruction of Southern people, the Anglo-Saxon civilization of the South, or which is bent upon the destruction of the American system of government. And, I think that statement will apply in particular to a member of the United States Senate, because I am sworn to preserve, protect and defend the Constitution of the United States.

Let me tell you, my friends, we have dark days ahead in the South. In my judgment the situation is going to get worse before it is going to get better, but against all hazards the South must act as a unit and take a unified position. The truth is that the average man, north, south, east and west, thank God, thinks alike. It has often been said that if we knew each other better, we would love each other more.

I was talking to a distinguished senator from New England a few weeks ago. He said, "Jim, when all this agitation started, the average man in my state would say, 'Why, of course you have got to give the Negro all of his rights.' " He said, "that is all they knew about it." "But," he said, "this school integration, the end of segregation, the destruction of our government, has struck home, and today in my state, the average Rotary Club or the average civic club would adopt identical resolutions that the same clubs would adopt in your own state of Mississippi." My friends, I believe in that statement.

You have got some froth at the top, highly organized, vocal, and blood red. There are in existence in this country today 213 communist front organizations. The vast majority of the memberships of these organizations are not communist, but these organizations, as found by the Attorney General of the United States, have been manipulating and are promoting the progress and programs of the communist conspiracy. Their operations are world-wide. They pit race against race, class against class; they teach the laboring man to hate the employer—when after all their interests are identical—and set religion against religion. And, throughout it all, there is a movement to centralize power in one strong central government, because throughout their history when they get a strong central government they are able take it over. They are spending hundreds of millions of dollars in this country today to promote these things. Let's take one organization, the National Council of Churches—they have even penetrated religion—or the Federal Council of Churches, which previously was a national council of churches. The investigating committees have found officially, and these are official figures, in that one organization that over 700 of its officers and officials have belonged to one or more communist front organizations.

The average man in nthe north will agree with you but it doesn't influence his vote. If you are in the bag politically, if you stand for something and won't vote for it, then the politician will pay no attention to you. In the average congressional district and in the average state there is practically an even division between the political parties. And there is the highly organized group at the top whose vote means a balance of power, and the politicians sing the song of this organized group, even though they are hopelessly in the minority. What we in the South have got to do is reach those great masses of people who agree with us, but who are unorganized, and show them the issues involved.

I think I can state without fear of contradiction that the southern states are the last great bulwark of Americanism in this country. In the United States Senate at one time we could defeat anything by filibuster. It was just a custom that senators believed that under no conditions would they vote to shut off debate even though the rules so provided. Section 3 of the civil rights bill, as sent us by the House of Representatives, could have been defeated by filibuster. But who was it that lined up? It was the liberal democrats of the North who lined up with the Southerners to strike that section from the bill, and when it was stricken there was no chance to defeat the bill by filibuster.

Before I discuss some other question, I am going to briefly discuss one great question that will confront the American people and will build up, in my judgment, to great proportions within the next few years. That is the question of whether the United States will surrender its sovereignty. When we ratified the United Nations charter, there was a statute in connection with it which set up a United Nations International Court of Justice. That statute provided that the court would determine its own jurisdiction. Senator Conally of Texas, the Chairman of the Appropriations Committee, placed in the proposed statute a reservation that the United States would determine for itself what questions were domestic questions of the United States. In other words, we would not subject ourselves to jurisdiction, without our consent, of a purely domestic question. The United Nations charter went at great lengths to guarantee civil rights, the right of free association and of inter-marriage to every person in the world, and there is an international court, whose duty it is to determine the cases brought before it, to outline the remedies and bind the countries which agreed. We were protected by the reservation that we would decide for ourselves whether or not it was a domestic question. On the 13th of April, the Vice-President of the United States, while speaking in New York City, made an alarming statement. He said that the President would soon send a special message to the Congress to repeal the Connally reservation, whereby the international court would determine what is a domestic question in the United States. I don't have to tell you that there never was a court in the whole history of the world that has not extended its jurisdiction. Mr. Nixon said that there were only two cases a year in the court and the court had no work. Of the 42 countries that are in the United Nations, 38 of them, every country except Finland, Haiti, Nicaragua and Paraguay, have identical reservations. If that provision is changed, you submit the question of civil rights in this country to that court. You submit the question of interpretation of a treaty, any question of international law, any immigration problem that we could not control in this country, or any tariff duty to the decision of this court. The court has one American judge. It also has a Communist judge. In other words, you would let a man from Asia, a communist from another section of the world, an American judge, a European and a Middle-Easterner, pass on what are the domestic affairs of this country, and bind our government to support and to obey that decision. My friends, it would destroy the sovereignty of our country. Why, we couldn't even pass rules and regulations for shipping in the Panama Canal.

I think the Bar, during these troubled times, has a great obligation in keeping this state charted on the tried and true legal principles which have built America, and you must, at all hazards, take a stand to protect our nation's sovereignty. You know, it isn't an accident that there was a revolution recently in Panama. In case of war with the Soviet Union, we could not live as a nation if we lost the Panama Canal, because we do not have the transportation facilities or the ports on the west coast to handle shipping. It is absolutely necessary for the security of our country to control the Canal. The Gulf of Mexico, the Caribbean and the South Atlantic must be an American lake that we can absolutely dominate, in order that we can obtain supplies from Latin America which are necessary for our defense and preservation.

The communist movement for Latin America is centered in Mexico. There are 1000 pouches of mail a day which clear the port of New Orleans sent from Mexico to Latin America, which contain communist propaganda aimed at weakening our country in that area. You have today a communist influenced government in Cuba and Venezuela. In the past few years, just through New Orleans alone, there has been roughly a 15 per cent increase a year in the communist propaganda from Mexico.

I will mention one example of the fact that our country does not have strong leadership. I get letters from American businessmen in Cuba; I got one from a former officer in the American Army who owns a sugar mill. He said, "They haven't taken my sugar mill, but the revolutionary army forced me to sign a labor agreement that means I will lose my mill." Since that time they have adopted, as you know, a program to confiscate land, a large part of which is owned by citizens of this country. Why should we have a communist influenced government at our doorstep? My friends, the United States is the market for the chief product of the island. We import three to three and a half million tons of sugar from Cuba each year. We pay them on an average of $120,000,000.00 more than we would have to pay to buy that product on the open market. In other words, the people of the United States reach down in their pockets and put up $120,000,000.00 a year to subsidize the economy of Cuba. All we would have to do is tell them, "We will make other arrangements for our sugar supply." But our country will not face this necessity. Of course, information concerning military equipment is classified matter, and I am not making any statement about it except to the effect that there are people in the State Department who desire to double the military equipment that goes to the Castro regime. Does that make sense? Why? I think that there is a very unwholesome influence in our country.

My friends, the Supreme Court of the United States has amended the Constitution. It has misconstrued statutes. It has built a wall of protection around the communist conspiracy. Why? There is a case which holds that the immigation service cannot, when they catch a communist agent who is an alien, ask him about his current communistic activity in our country. Why? You know it is fundamental that the Constitution had a fixed and definite meaning when it was adopted and that that meaning cannot be changed.

Mr. Justice Douglas, in writing the controlling opinion in one case, has held that stare decisis does not apply to constitutional questions, but that the judge should have the right to change his mind. Of course, under a system such as that, we are not secure in any rights or any liberties which we possess. Earlier this year, the court, in the case of *Frank v. Maryland,* said that the constitutional protection afforded by a search warrant is denied in spite of the provision of the Fourth Amendment of the Constitution. The Fourth Amendment reads, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." They held that a health inspector, which in most cities is a policeman, had the right without a search warrant, and over the objection of a homeowner, to search his home without a warrant. I had always believed that it was fundamental Anglo-Saxon law that a man's home was his castle and not even the king could enter there. But, earlier this year that was swept away by our Supreme Court. And you know what ground the decision was placed upon? Because, said Mr. Justice Frankfurter who wrote the opinion, "The majority of the American people acquiesce and we have changing sociological conditions." Now there it is. There is the decision. It is the same reason as was given for the *Brown* case, "changing sociological conditions." On that same day, there was the *Vitarrelli* case, which also was decided on history, dominant public opinion and sociology. The law says that when a man doesn't have civil service protection he can be immediately fired without assigning any reason. Vitarelli was fired, but the reason assigned was that he was a security risk. The court said, "Oh, no, you can't fire him because he is a security risk. Put him back to work," and he got $30,000.00 in back pay. The Court said you could fire him without stating a reason, but if you gave a reason based on considerations of internal security, then you couldn't discharge him.

My friends, during the past few years there has been a terrific battle in the United States in which public opinion has swung far, far to the right and now opposes these funny decisions of the Supreme Court. I think that their stand on internal security and on Communism was the Achilles heel that has moulded public opinion in this country against the court. In the future I think, as far as the Senate is concerned, that we have hope in one respect. There was a time when the South was dominant in the Senate. That time has passed. Political power is going toward the West, as the population increases, and two new states have come into the Union whose economies and societies are orientated to that of the northwest and the far west. We don't have the enemies there that we have in the eastern industrial states, and I think that is a very helpful sign. I can tell you on my word that the Supreme Court of the United States is very alarmed at public sentiment in our country. After all, it is the law; it writes the decisions. Why, an opinion written by my friend Percy Lee there, wouldn't be worth the paper it was written on, if the people wouldn't support it. Last week, in the *Baranblatt* and *Uphouse* cases, the Court took a far step backward. They had held in the *Watkins* case, which was aimed at my Internal Security Sub-Committee, that we could not fuss at a college professor since the school teacher had a preferred position under our Constitution, that we could not ask one about communistic affiliations under the First and Second Amendments to the Constitution; they said you had to show a legislative intent or a legislative purpose, and that you could not expose a man through investigation. Now they have reversed themselves in the *Uphouse* case. I am not going to discuss the details, but they took a backward step. That, in my judgment, was done because they realized what public sentiment was in this country. Let me tell you something, I have seen too many Federal judges that would toady to Supreme Court judges, and I have seen too many Federal judges who would toady to their superiors on the bench, many of them trying to go along in order to get promoted. Now what happened in these two cases? They first went to the Supreme Court and both of them were sent back for a new trial. Why? They said they granted the new trial, first, because of the *Watkins* decision. In the *Uphouse* case they granted the new trial because of the *Nelson* and *Sleazy* cases. The *Nelson* case held that the state could not prosecute or investigate communist subversion within a state. They went back to the lower court.

What did the lower court do? They held their ground, and when it went to the Supreme Court again, the Supreme Court capitulated. We would have more of that in this country if our lower Federal courts would hold their ground.

This whole thing is wrapped up in the integration question. My friends, you read the decisions last fall. If I ever read political decisions, it was then. The new members of the court who did not participate in the hearings adopted an unheard of thing by stating that they were bound by or that they believed the decision in the *Brown* case was correct. As a result of this we have some weak-kneed Southerners who have been going over the South hollering that integration is inevitable and at the same time stating that they would accept token integration, though forced to do so by Federal power, and that they could contain token integration. One of these men gave as his reason for capitulating that he didn't want to be another Faubus. Great goodness! There is no forced integration in Arkansas even though all the power of the Federal government has been focused against Arkansas as the first state to try it.

I talked to one of the leading politicians of the United States, a man high in the councils of one of the major political parties. He made a statement which I believe. He said, "If you will open a campaign office for Faubus in Chicago, and one in Cleveland, and one in New York, you would be surprised at the reaction that you got." My friends, what we have got to do is stand our ground and simply say, "No, you can't force integrated schools upon us." This thing of gradualism is a deadly doctrine. Once that dam is breached, there is no turning back. I don't have to tell you that the real meaning of token integration, as it is used in areas of the South, is nothing but massive integration, and the men who preach it know it. It is used by cowards and by politicians who would betray their people because of weakness, or because they desire to promote themselves in public office on the national scene at the expense of their people. We can't compromise, and we are not going to compromise.

Let me tell you that when we close the schools, if we will give the private schools a chance to be organized and function, before some weak-kneed fellow runs around and says, "We have got to take a few of them; it is inevitable; We can handle it;" then your private school system will be a success. The weak points in the South today are the big business men, because many of them are afraid they'll lose money. They say, "We have got to accept some integration." That was true in Little Rock where the country club precinct voted for integration. That was true in Virginia. There is a labor union in Front Royal, Virginia, that has financed a private school there by taking the dues of the members each pay day. That private school has been a success. There are two counties in Virginia, Prince Edward and Floyd, which have abolished their public school system.

My friends, the people of the North would not stand for the abolition of the public school system in the South. The best way in the world to call their hands is, when we have to, to close the schools, and let them stay closed. You will have a hue and cry from Maryland to Maine that in the national interest we can't stand for such a thing. What we have got to do is fight the weaklings who say, "Let's yield, let's compromise, let's take a few."

My friends, I have said a number of times in Mississippi, and in other states, and I am going to say it again, that it is absolutely essential that we be aggressive, and that we lay our case in the court of public opinion north of the Mason-Dixon line. We can't sit here and do nothing while the rain of propaganda through the medium of the press, television, radio and magazines beats down upon us. The Legislature of Florida passed a bill which provided that Florida would put up half a million dollars for the South to use in its defense when joined by four other southern states with an equal amount. I know it is essential that we use state funds to mobilize public sentiment, and to continue the trend in our favor over the nation. When we do it, we not only have nothing to fear, but we are going to win a great victory because, thank God, the great majority of Americans think alike and they are allied with us in this fight.

I thank you.

Mr. Thomas H. Watkins of Jackson presented the Report of the Committee on Judicial Retirement. Upon motion and second this report was adopted.

Mr. George E. Morse of Gulfport presented the Report of the Complaints Committee. Upon motion and second this report was adopted.

Mr. Meredith Wood of Brookhaven presented the Report of the Committee on Taxation. Upon motion and second this report was adopted.

Mr. Dixon Pyles of Jackson presented the Report of the Conference of Local Bar Associations. Upon motion and second this report was adopted.

SATURDAY, JUNE 13, 9:00 A. M.

Judge Tom P. Brady of Brookhaven presented the Report of the

Code Study Committee. Upon motion and second this Report and the Report of the Junior Bar Section was adopted.

Mr. C. Sidney Carlton of Sumner presented the Report of the Lawyer's Business Affairs Committee. No action was necessary on this report.

Judge Leon F. Hendrick of Jackson presented the Report of the Supreme Court Building Committee. No action was necessary on this report.

Mr. Bidwell Adam of Gulfport then introduced Governor Orval Faubus of Arkansas, who delivered the following address.

ADDRESS OF GOVERNOR ORVAL FAUBUS

Thank you, Mr. Adam, Mr. President, officials of the Bar Association of the State of Mississippi, its members and guests. You do me great honor, and I deem it a great privilege to have the distinction of being invited to address you today. Being an ordinary layman among a group of learned people, I must admit to you that I face my task with some trepidation in my effort to discuss with you what I consider to be the greatest questions of this century, and certainly some of the greatest in the field of law and constitutional government that have faced this nation during its history. Soon this Republic will be 200 years of age. There are many things which lead us to wonder whether we can continue for the remaining 18 years, as a republic of free men under the precepts of democracy, until we reach that 200th anniversary.

Many of my close friends know that one of the great unfulfilled ambitions of my life was to be an attorney. Unfortunately, I went to Commonwealth College where they did not teach law. I found that it wasn't a proper place for any sort of learning, unless you wanted to be trained in the elements and doctrines of the left wing philosophy of that time, so I left and went back home. Therefore, I did not attend any college except by taking correspondence courses from the University of Arkansas, and that was on a very limited scale. Following my return from the war and my separation from the service, I went to the University and applied to become a special student in the field of law, and was accepted. Then I had an opportunity to purchase the newspaper at Huntsville, and was offered the appointment as Postamaster. Being a man of modest means, there was no time left to study law, and so it is an unfulfilled ambition of mine. Now it is quite possible that if I had studied law and had become successful, I might no have had to strive so hard in other fields, and I might not even be here addressing you in the role which I now play. It reminds me of the man who did not learn to read and write and went down one day and applied for the job of janitor of his church. They found that he wasn't able to read or write and he was not given the position. He went out into the world, entered the field of business, and made a fortune. This was thirty or forty years ago. He came back home and was welcomed as a most distinguished son. He was giving great donations to the church which had failed to employ him, and had contributed thereby to its progress. A member remarked to him that there was no telling what position he would now hold had he been able to read and write. The man replied that he would probably still be janitor of the church.

Ladies and gentlemen, I sometimes think that if most of us were as smart as some of the sociologists in this day and age want us to be, we would lose the game of democracy and the struggle for the freedoms and liberties which we have known. I would like to read for you some quotations. You will probably recognize them.

> "The Supreme Court has been usurping the rights reserved to the states by the Constitution. The Supreme Court has been making hasty, impatient decisions without proper judicial restraint. But recent decisions raise considerable doubt as to the validity of the American boast that we have a government of laws and not of men. The development of immense power of the Supreme Court in both state and national affairs is second only to the increasing dominance of the national government. It is not merely the final arbiter of the law. It is the maker of policy in many major social and economic fields. It is here that we feel the greatest concern and it is here that we think the greatest restraint is called for."

These are not my words. These are not the words of any states' rights advocate in the political field at the present time. These words are in the report adopted last year by a conference of Chief Justices of the state supreme courts of the United States. These eminent jurists represent all the states and two territories. This unprecedented report strongly condemning the United States Supreme Court, or the "Supreme School Board" as it has now become, in the language which I have quoted above, was adopted by thirty-six favorable votes—four and a half times the eight votes that opposed it. What brought forth this condemnation of the highest judicial tribunal in the land by the most eminent jurists of the various states of this Union? A number of things. Not the decision of May 17, 1954, in itself, because such condemnation by some of the chief justices might not have been made upon the basis of that one decision, but upon many of them. You are familiar with the fact, and I won't attempt to recite the details, that in a certain state of the Union, the Bar Association of that state promulgated certain rules and regulations to prohibit the practice of law by known and avowed Communists—those who advocate the overthrow of existing state governments and our national government by force and violence. Acting upon these regulations and policies adopted by the Bar Association, laws were passed in that state by the people's representatives, the Legislature. Soon there came along a fellow who applied for admission to the Bar, and took the examination. He was known to be, and did not deny that he was an avowed Communist, and, therefore, advocated the overthrow of the government by force and violence. He was denied by the Bar Association a license to practice law. He appealed to the state courts, and the state courts upheld the Bar Association. He appealed to the United States Supreme Court, and the lower courts and the Bar Association were overruled. They were compelled to give this man a license to practice law in that state. That occurred not in the South but in Warren's California.

Then, there was found about the same time in the East, a known and avowed communist who was a teacher in a school. The School Board became aware of it, and, desiring to prevent any such alien teaching of the children of that district, dismissed the teacher. The teacher appealed to the courts of the state. The lower courts and the state supreme court upheld the school board in its decision. The appeal was carried by the individual teacher to the United States Supreme Court, and there the lower courts and the school board were overruled. They were compelled to reinstate in the school-room this known and avowed communist, and to pay him two years back pay which had been lost during the period of litigation. This did not happen in the South. It has happened in New England.

There were other states nearer to us—Kentucky, Tennessee and Indiana to name three—whose lawmakers, knowing of the worldwide struggle between the forces of totalitarianism with those who believe in the precepts of democracy and the free world, sought to protect their own state governments and the nation at large by prohibiting subversive teachings and advocacies within the state, especially those calling for the violent overthrow of existing state governments and the federal government. Sometime after the laws were enacted certain individuals were arrested and charged with subversion—the teaching of the violent overthrow of our form of government. They were tried in the courts, having to their benefit all the safeguards known to our judicial system. They were convicted upon the evidence that was available, and they were sentenced and their punishment prescribed according to law. These subversives appealed to the higher courts of the state, which upheld the convictions. They appealed to the United States Supreme Court, and the convictions were overruled. You know, it was said in that decision that you cannot prohibit the *advocacy* of the violent overthrow of the government. You have to wait until they *attempt* it before anything can be done.

Now I wish to cite two recent decisions of the United States Supreme School Board. There is a basic precept of law which has been firmly implanted in the minds of our people in all sections of this nation, and in all ranks of its society. It is that no person, under our Constitution and the laws of our state or nation, can be placed in double jeopardy. A recent decision of the United States Supreme Court has nullified that principle, another of the constitutional guarantees of freedom under our Bill of Rights.

Then more recently, only a few days ago, another decision of the United States Supreme Court has jeopardized another of the liberties or safeguards which we thought was guaranteed to us by the Bill of Rights. Remember the history of James Otis and the writs of assistance. This great orator of the American Revolution stated that a man's house is his castle, and that so long as a man took refuge in his own home he should be as safe from molestation as a knight in his castle. Acting upon the advocacy of this great orator of the Revolution, when the Colonies won their independence and the Constitution was drafted and adopted, this safeguard was placed in it. Now, under this ruling of the Supreme Court, all that any tyrannical form of government which might spring up in Washington needs is to clothe its agents in the guise of health inspectors, and they can go into homes for any reason to look for anything, under the pretext that they are looking for cock roaches or rats, in the same manner as the secret informers of the agents of Hitler or the secret police of Communist Russia. I think we had better begin to look for the rats some other place.

The first ten amendments are the Bill of Rights of our Constitution. All close students of history tell us that it became readily apparent that the Constitution, after its adoption by the constitutional convention, would not be ratified by a sufficient number of states to put it into effect, unless it was clearly understood by the people that it would be immediately amended by the first Congress. A number of states ratified it with this understanding. In fact, the acts of ratification, still available for reading in some states, provided that it was effective only upon a successful adoption of certain amendments. That is the reason the very first session of Congress adopted the first ten amendments to the Constitution of the United States, and these ten amendments have since that time become known as the Bill of Rights. The First Amendment contains this phraseology: "Congress shall make no law prohibiting the right of the people to petition the government for a redress of grievances."

Shortly after the September crisis in Little Rock in 1957, two students in a large school in Illinois petitioned the school authorities for segregated classes. A number of the other students signed the petition. Whether this was done for a prank or whether it was a sincere expression of those students matters not. As a result of their action, the two circulators of the petition were immediately suspended from the school and arrested by the authorities. Charges were placed against them, and they were threatened by the judge with even further reprisals should they give countenance to any such activity in the future. Contrast that, if you will, with the rulings of the courts concerning the right of a citizen to be a communist and to advocate, not merely the overthrow of the government, but its overthrow by violent means, which has been upheld by the federal courts time and again. As the Lieutenant Governor of our state said some time ago, a person who is a known and avowed communist can receive more consideration in the Federal courts of this day and age than can a segregationist of any color.

The Second Amendment to the Constitution says: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." I think this amendment was very clearly violated in the federalization of the Arkansas National Guard in September of 1957, not in order to defend the nation, not in order to use the troops because they were needed to safeguard liberty and the welfare of the nation and its people, but in order to deprive the state and its people of the use of said militia. Never before in the history of the Republic has such action been taken by the Federal authorities. Yet, the orders came to me to "transmit through you" the order to federalize the Guard. That is the way it has always been done. That is the way the law prescribes. That is the way it is set up in the Federal code. I declined to transmit the orders. Then they went to the Adjutant General, and the Assistant Adjutant General and then said, "We will go on down the line until we find someone who will transmit the orders." Conceivably the order to federalize 10,600 Guardsmen could have been issued by a corporal or private first class. These were unprecedented actions in the history of the Republic!

The Third Amendment says: "No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." The sending of 1,200 Federal troops of the 101st Airborne Division to Little Rock to occupy any place they saw fit seems to me to be clearly an infringement of the rights guaranteed to the state by this amendment to the Constitution. The Federal troops quartered themselves on state property without permission, and encamped upon and occupied the school grounds of Little Rock, an institution which is supported entirely by state and local funds. They even occupied private property for a time, and to some extent. They chased people off the lawns and front porches of their own homes, and did not allow them to return for hours.

The Fourth Amendment reads in part: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated." The recent ruling of the Supreme Court already mentioned is the first major infringement upon this article of the Bill of Rights in the history of the Republic.

The Fifth Amendment reads in part: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." I have already cited to you the decision which now nullifies that provision of the Bill of Rights.

Amendment Six reads in part: "In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed." You are all aware of the recent efforts of certain so-called civil rights advocates in the Congress to pass a law taking away the right of trial by jury. This would clearly have been an infringement of this constitutional guarantee. Thanks to those constitutional lawyers and those who want to retain the Constitution, both in the South and North, that this provision was defeated in the civil rights measure which was before the Congress some months ago.

Amendment Nine reads: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Simply because some right may not have been enumerated, this amendment was put in specifically to cover any omission or oversight by those who drew up the amendments or those who framed the Constitution. I think falling in that field is one right that has been precious to the hearts of all free people upon the face of the earth, and that is the right of freedom of choice as to associates which is now being taken away.

And the Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." That final safeguard granted to the Federal government only those things which were specifically set out in the Constitution as being granted to it, or which were specifically set out as being prohibited to the states.

So we come to the Supreme Court decision of May 17, 1954. In this connection, we hear a great deal of the phrase, "Supreme Law of the Land." Who makes the laws of the land? The Congress, for the nation, and the legislative bodies, for the respective states. These are the only law-making bodies. No law can be changed and no new law can be made except through the functions of Congress or the State Legislatures.

If we are to accept the phrase "Supreme Law of the Land" as coming from the United States Supreme Court, then what was the law of the land on May 16, 1954? The law of the land and the laws of the states were that "separate but equal" facilities were constitutional.

If "separate but equal" was the law of the land on May 16th, then what brought about the change in the law from one day to the next? Had our Constitution been abolished and a new one written? No. Had our Constitution been amended as provided for in that document itself? No. Had Congress changed the law, thus making necessary a new interpretation by the Court? None of these things had occurred. Therefore, if the law changed from one day to the next without any of these actions taking place, then the Court must have made a new law itself. All of us who are informed citizens know beyond any peradventure of a doubt that the making of laws is not within the scope and jurisdiction of the Court and that the courts have no authority in this field whatsoever.

Then, if the Constitution was not changed or amended, and no new law was passed, and the Supreme Court has no power to make a new law, we must accept as a basis for the Court's ruling that it, the membership at that time, had decided that all the previous rulings over a period of almost one hundred years had been in error, and that the court was taking upon itself the grave responsibility of correcting this error without any action of the people's representatives or by the people themselves.

All of you in the legal profession know that precedent helps to make the law, and precedent is what you have, without exception, for the "separate but equal" doctrine.

Then if the Court was making this ruling on the basis that the other rulings had been error, might not this ruling also be error? And if that be the case, may not the people oppose the ruling as being error?

I say that the people may oppose it and that they have that right as free citizens of this Republic just as did the citizens of the Republic in the 1850's when they properly opposed the Dred Scott decision, which was later overruled and nullified.

Samuel B. Pettingill has been quoted in the December, 1958, issue of "Human Events" as having this to say: "But more important than integration or segregation is the preservation of the Constitution against the brain-washing of the American people now going on to support the curious notion that a decision of the United States Supreme Court, any decision, is the law of the land."

President Roosevelt said in 1930: "The preservation of home rule by the states is a fundamental necessity if we are to remain a truly united country. We are safe as long as the individual home rule of the states is scrupulously preserved and fought for whenever it seems in danger."

Again, Congressman Pettingill said: "It is the maxim of the law centuries old that the intention of the law-giver is the law." As the Supreme Court once said (when it had wiser members), "The whole hope of the constitutional construction is to give effect to the intention of the framers of the instrument and, additionally, to the intention of the people in adopting it."

As evidence that the proposing of the Fourteenth Amendment by the Congress was not intended to forbid the establishment and maintenance of segregated schools, the Congress at the same time passed a law *requiring* segregated schools in the District of Columbia. Also, the state legislatures, in ratifying the Fourteenth Amendment, passed statutes requiring or *permitting* segregated schools. In our own state of Arkansas, when we were under carpetbag rule, when about one-third of the members of the lower house were Negroes and a little more than one-third of the members of the upper house were Negroes, when the state was entirely dominated by scalawags in our own midst and carpetbaggers from the North, aided and abetted by the military rule, both white and colored members of the Legislature passed laws setting up segregated school in the state of Arkansas. There was no question about it then. So if we would take this maxim of the law which is centuries old, that the intention of the law-giver is the law, then the intention at that time was that the states had the right to set up segregated schools within their boundaries if they wished. There is not a word in the Constitution which gives the Supreme Court the power or right to enact laws or amend the Constitution by giving it meaning which the proposing Congress or ratifying legislatures or the people did not intend it to have.

Congressman Pettingill also said: "The only persons who have the power or right to amend the Constitution are the people, in the manner set forth in the Constitution. The only persons who have the power or right to enact Federal law are the members of the House and the Senate and the President by his approval. This is what is meant by government of law, and Congress has never said that segregated schools are against the law." This quote is from Pettingill, a Northerner.

Thomas Jefferson wrote:

> "It is a very dangerous doctrine to consider the judges the ultimate arbiters of all constitutional questions. The Constitution has elected no such single tribunal." Jefferson further wrote: "The germ of dissolution of our Federal government is in the Constitution of the federal judiciary; an irresponsible body, working like gravity by night and by day, *gaining a little today and a little tomorrow,* and advancing its noiseless step like a thief, over the field of jurisdiction, *until all shall be usurped from the states,* and the government of all be consolidated into one. To this I am opposed; because when

> all government, domestic and foreign, in little as in great things, *shall be drawn to Washington as the centre of all power, it will render powerless the checks provided of one government on another, and will become as venal and oppressive as the government from which we separated.*"

How prophetic were his words.

George Washington said, speaking of the division and distribution of powers:

> "If, in the opinion of the people, the distribution and modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation, for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed."

Therefore, I would say to those who are sincere integrationists—who believe in it sincerely—that they have that right under the Constitution and they have the right to advocate it. But they have no right to put it into effect by usurpation, for even from their viewpoint, while it may in this instance to them be an instrument of good, it is, as Washington said, "the customary weapon by which free governments are destroyed."

The point which I wish to make from all of this wisdom of both the past and the present is the inescapable fact that the safeguards of liberty enacted for the protection of the people are fast being whittled away by the illegal usurpation of powers by the Federal government, principally by the United States Supreme Court.

What of the racial question in relation to these problems? It is merely one facet of the problem. It is just one of the many points of conflict. Because of its inflammatory nature, it has been highlighted out of all proportion to its true relation to the overall problem of the division of powers and the retention of constitutional government in America. The way most of us feel in the South, and the way most segregationists feel, is fairly well summed up by Noel Smith, Editor of the Baptist Bible Tribune of Springfield, Missouri. In speaking of the Negro, he writes:

> "I not only respect this man, I have and always have had a deep and genuine affection for him. I recognize the inherent dignity of his person. His place, so far as I am concerned, is wherever his character and ability lead him. I want him to get the same value for his tax dollar that I get for mine. I want his child to have the same advantages and opportunities that mine has. Since the Great Creator Himself is no respector of persons, neither am I, and if Whites and Negroes wish to live together, eat together and attend

> school and church together, I am in favor of their being permitted to do so."

Those are the words of Noel Smith. ". . . but I am opposed," continues Smith, "I am opposed to the Supreme Court of the United States forcing Whites and Negroes to associate themselves together in this way, against their mutual desires and against their mutual interests. I believe in the right of voluntary association. I am opposed to the Supreme Court's proposition of legal compulsion."

"As to the South, the radicals and egg-head intellectuals are all the time screaming how the 'poor Negro is being persecuted' in the South." I am quoting from the Negro Year Book for 1949, published by McMillan. The book was edited by Florence Murray, a brilliant Negro newspaper writer. Here is what we find in the words of this Negro writer in compiling this book.

On Page 200 we have a list of Negro lending institutions. Fourteen Negro banks are listed in the United States. All but two are in the South.

On pages 205-209 are listed the local business leagues and chambers of commerce. There are 124 such organizations in the United States. All but sixteen are in the South. Ohio has the largest number north of the Ohio River. It has four, the exact number as are in Arkansas. In Governor Williams' Michigan there is listed but one. The Chicago Tribune's Illinois has but three. Chief Justice Warren's California has but one. Georgia has eight, and Texas has forty-two. Not a single one is listed in Indiana, which includes Indianapolis, to which Negroes have been going from the South since the button-shoe age.

Then on page 201 of this book we read:

> "Among the larger Negro-operated (insurance) agencies which had more than $25,000,000 worth of insurance in force in 1944 were Atlanta Life Insurance Company, Atlanta, Georgia; North Carolina Mutual, Durham, North Carolina; Supreme Liberty Life, Chicago, Illinois; University Life, Memphis, Tennessee; Pilgrim Health & Life, Augusta, Georgia; Africo-American Life, Jacksonville, Florida, all of these having more than $25,000,000 in force. Only one was outside the South."

The Negroes' own records show here and everywhere else that the greatest progress the Negro has made and is making has not been in Africa, not in any country dominated by Great Britain, not in the East, not in the North, not in Warren's West, but in the South.

There are more Negro college presidents in Arkansas and Texas than there are in all the rest of the nation outside the South.

Now what of the physical aspects of the Little Rock situation and the racial question in Arkansas itself? In the state at large in Arkansas more public schools have been voluntarily and peaceably integrated than in nine other southern states combined. There are more Negroes in one public integrated high school in Arkansas than there are in the integrated schools of the entire area of the so-called moderate state of North Carolina. And you know *Time* and *Life* magazines try to make great moderate states at the present time out of North Carolina and Florida.

The University of Arkansas and all institutions of higher learning except two have been peaceably integrated in Arkansas. My own son attended one of these state-supported integrated colleges. Where are Vice President Nixon's children—the star honorary member of the N.A.A.C.P.? They are in a private segregated school. He entered them in the public schools in Washington, D. C., when he could find some that were segregated; then when some Negroes moved in he took them out and they are at this time in private, segregated schools. Where are Eisenhower's grandchildren? They are in private, segregated schools. Where are the children of the only member of the United States Supreme School Board who at the present time has children in school? They are in private, segregated schools. Where are the children of our chief critics in Congress? Why, they have moved over to Virginia where they can find segregated public schools or private segregated schools. "Consistency, thou are a jewel," but jewels in public life are damn hard to find.

What further of the situation as it affects Arkansas? All forms of transportation have been integrated in Arkansas for some time. Both the Democratic and Republican parties of Arkansas have Negroes as members of the State Central Committees. It was at my behest that Negroes were put on the State Democratic Committee after my nomination for Governor in 1954. The Republican Central Committee has Negroes on its committee. The Negroes are basically supporting the Democratic Party. It was recognition which was just and fair. I make no apologies for it. But now, since the Legislature has provided that the members of the committee must be elected, of course there are no Negroes on the Central Committee in Arkansas.

In the field of state service for the members of all races (but for the Negroes specifically), the McRae Sanitorium for Negro tubercular patients is one of the best run facilities in the state, under the able leadership of a Negro doctor and a staff made up entirely of Negro personnel. A. M. & N. College for Negroes at Pine Bluff receives the highest appropriation per student of any institution of higher learnin the state of Arkansas by far. If the Whites were receiving proportionately more per student, you would hear the greatest howl ever from the N.A.A.C.P. about discrimination. The institution for delinquent or wayward Negro girls is a new, modern facility, much finer than that provided for the White delinquent girls in Arkansas. Then go to Little Rock itself and look at Horace Mann High School from which the famous nine came (paralleling the nine in Washington, I suppose) to enter the White Central High School. They left a new, modern school. In the *Architectural Record* of September, 1957, you will find Horace Mann High School rated fifth in the entire nation as to utility, beauty, comfort and modern design. That is the Negro school in Little Rock, Arkansas, as contrasted with Central High School, which is thirty years old, two or three stories high, and has none of the modern concepts which are now available. Another small example—there is a drinking fountain in each room at Horace Mann. There is one on each floor in Central High School where the Whites attend school.

A great deal has also been said about civil rights. In the voting field there has been no difficulty in Arkansas. For many years past, each and everyone has voted freely and there has never been the slightest incident involving voting rights since I enterd actively the field of state politics some ten years ago. In fact, the Negro block vote of some 4,000 decided the recent election in Little Rock, Arkansas.

I am sure that many of you and millions of others are unaware of the excellent relations which have existed between the races in Arkansas or other places in the South. Many of you are likewise unaware of the great progress that has been made by all people of the state, regardless of race, creed, or color. There were many things that could have been written that would have reflected credit upon the people of Arkansas. All of these facts and many others which I could mention were freely available to the host of reporters that swarmed like locusts over the city of Little Rock, Arkansas, in the crisis of 1957. And they still come. I interviewed reporters from behind the Iron Curtain, from Hong Kong, from China and Japan, South Africa, the countries of South America, Scandinavia, France, Britain and every state in the Union. Many of them came from Canada. Almost every television and radio station had a representative in Little Rock. They declined to relate the facts, all of them, as they found them, or else certain facts were deleted by their editors after the receipt of their stories.

This situation has become known as the "Paper Curtain." It exists not only in the South, but throughout the nation. A striking example of this was a recent occurrence in the City of Washington. I was privileged to attend the dinner given by the Good Government Society at which the George Washington awards were made to Senator John L. McClellan of Arkansas and Admiral Lewis Strauss. There were more than 800 people in attendance from all over the country. The oration of the evening was made by Senator Barry M. Goldwater of Arizona.

The presentation to McClellan was made by Congressman Charles A. Halleck, the Republican leader in the House. The award to Admiral Strauss was made by Senator Harry Byrd of Virginia. These are prominent men of outstanding ability. Many things were said which I, as a citizen, as a public official, as a newspaper man, thought were newsworthy. I looked in the newspapers of Washington, D. C., the next day to see what had been said about this meeting. Not one single word could I find of this most newsworthy event. Why? I can reach only one conclusion at the moment. They did not say the things which were pleasing and suitable to the pseudo-liberals and fuzzy-minded leftwingers who today are writing most of the news and publishing most of the big newspapers and magazines of this nation. I have been a close observer of this situation for some time. There is too much effort on the part of the national press in both the newspaper and magazine fields to write the news as they want it to happen, not as it occurs. They color, slant, and distort the stories to conform to their personal views and ideologies, instead of reporting the facts as they are. Ladies and gentlemen, I should know it well. I have faced all sorts of questions delivered or asked in every conceivable form and manner. I have laid open my administration to all of them. They have come and they have checked, they have looked and investigated. You may do well today and you may do well tomorrow and the next day and so on for a long, long period of time and nothing is said. But some day you slip up when you are out of sorts and make one mistake, then it is headlines from Maine to California and remains in the headlines week after week. This trend is nationwide and has progressed to an alarming extent.

Oh yes, I remember when I was elected Governor in 1954. I emerged from a bitter campaign and from charges of communistic leanings directed at me, growing out of my brief connection with the red Commonwealth College. I received far more favorable publicity at that time than I have ever received since. The many worthwhile accomplishments that may have been made in the state of Arkansas during my administration have gone unnoticed. In this regard I do not refer to the state versus federal power struggle in which I have been engaged now for more than a year and a half.

I recall my first trip to Washington after I was elected Governor. All the contacts were made and the messages went ahead of me on the telephone and on the wires. I was put in touch with people who introduced me to certain parties. I met Drew Pearson, and got acquainted with him. I was invited to appear on his nationwide television and radio program. I was introduced to other writers of national fame. I received generally favorable notices by the ultra-liberal press and commentators of that time. And among those who promoted my favorable press coverage was the man who is now my chief critic, Mr. Harry Ashmore, executive editor of the *Arkansas Gazette* of Little Rock, the oldest newspaper west of the Mississippi, and at one time the largest in Arkansas. Ladies and gentlemen. I mention these things to make another point. There has been little, if any, change in my position on any of these questions of government from 1954 to the present time. Yet to them at one time I was a hero. Now I am a villain simply because I cannot be controlled and cannot be dictated to concerning my decisions in this controversial field of state versus federal power on the racial question.

My contention and my stand as an official and as a citizen has always been and is now, that the people only, are sovereign; that power is inherent with the people; and that it must continue to be so if we have democracy and are to continue to have a democracy. I contend the people are the best judges of what is good or what is bad for them. I reject, as the founding fathers rejected, the theory of government that those in authority should hand down from above all the decisions on our problems without any consultation with the people, to the complete disregard of the wishes of the overwhelming majority. Those are police state methods, and not democracy.

Secondly, we all recognize that the people may make mistakes. Is there anyone that is infallible? But, so long as the people have the right to make a mistake, they also have the power to correct it. Unless we observe this fundamental precept of democracy, then liberty and freedom are on the wane. We must reaffirm this basic precept of democracy: that rule is by the "consent of the governed," or our nation will go the way so many others have gone in the past.

Never as an idealistic youth reading of the goodness of our leaders, the greatness of our history, and the majestic principles of freedom, as embodied in our Constitution and our precepts of democracy, did I ever dream of all the forms of pressure and inducements that can be brought to bear upon an individual—pressure and inducements to forsake the sentiments and ideals dearest to the American heart by changing my policies in matters such as have faced me in the state of Arkansas.

The harassment and the hammering is constant and never ceasing. They pose as friends in an effort to persuade, beguile or deceive. They bring constant pressure in the form of never-ceasing criticism in the press, and by other means. They attempt to cow and subdue by threats of overwhelming force which cannot be successfully resisted. Then they offer, on the other hand, a period of security from the never-ending pressure and harassment, a period of peace for one's self, of tranquility for one's family, and in addition, praise, which is sweet to the ears of any individual, and possible advancement, which beckons to most good men. There are few indeed, who will not pause to consider these two alternatives, and, having paused to consider, there are fewer still who will not yield.

I want you to retain these thoughts. Can the republic long endure as a union of states with the constant whittling away of the powers of the states and the people? After the unwarranted invasion of the right of the states to control their own schools in the matter of attendance, how long will it be until the school authorities are told what to teach, what books to use, what not to teach and what not to use, what views the teacher must hold and must not hold, and who can teach and who cannot teach? You know these are logical next steps in the usurpation of power, because the groups which seek these powers were never more intent upon anything in the history of this republic than they are upon the brainwashing of the American people.

Look at the trend in the tax field. In 1932, the federal tax was 22.7 per cent, state and local tax was 77.3 per cent. In 1940, the federal tax was 38.6 per cent and the state and local tax was 61.4 per cent. In 1957 the federal tax was 73 per cent and the state and local combined was 27 per cent. In our state of Arkansas, for example, the Federal government takes more money out of that commonwealth in the federal income tax alone than the state of Arkansas gets from all of its tax sources of every nature, both local and state. And then they say that I should not accept federal funds from Washington without accepting federal dictation. Those are our funds. They went up there. They have a right to come back.

We in Arkansas do not wish to tell you in Mississippi or Alabama or Illinois, or any other state of this Union, how to solve your own problems. The right you have to solve them is guaranteed to you under the Constitution in the Bill of Rights, and by our state and federal laws. If we grant that consideration to all other states, then is it too much to ask for Arkansas? I have yet to find anyone anywhere, Yankee or Southerner, who can properly answer that question with a refutation. We have that right under the Constitution, if it can be restored to a sacred, living document and does not become merely a scrap of paper.

You have seen the progression in the state versus federal power controversy. What faces us now? The same thing, perhaps, which the free world faces in its struggle with totalitarianism led by communist Russia. Don't they know that our negotiators over there can have peace immediately if they will give up Berlin? But how long would the peace endure? Piece by piece, the communist seek to take over. So there must be a line drawn somewhere, where it can be said to them—"this far and no further." This must be done because each time we yield to the communists they grow that much stronger and the free world that much weaker.

That is the same dilemma with which we are faced in regard to the rights of the states versus the Federal government. Yield on this point and accept, as they call it in Little Rock, token integration, controlled integration, if there is any such thing (or intelligent integration—that is what they want us to accept right now), and we will get nine today and ninety tomorrow. It is one grade this year and three grades next year. It is the greatest fallacy and delusion ever attempted to be perpetrated upon a people.

Yes, I grant the right, as I always have—and some of you will disagree with me—that if the people of a community want to integrate, let them go ahead and do it. That is according to the basic precept of democracy, that people have the right to be wrong; that power is in their hands. But if the people don't wish to do so, they should not be compelled. That is where I rebelled in the negotiations with the Federal government after the trip, or during the trip to Newport.

Picture if you will—you in the legal profession can understand it well—this court sitting in a distant city where it hands down a decision in some area of conflict from which a storm is raised. When somebody questions the decision, they say, "Oh, that isn't our problem." Who reaps the storm? The local authorities and the governor of the state.

The federals say, "Oh, this is the law of the land. Now you have got to enforce it." Since when in this Republic have states ever been called upon to enforce federal court orders and federal law? The federals have the agents to do that. I say to you right now, they may again occupy Little Rock, they may occupy Arkansas, they may occupy the South, but, so far as I am concerned, if the dirty work is going to be done, they are going to do it.

Yes, some of these people of little understanding came and interviewed me time and again and they said to me, "Why don't you go out and tell them (the people) that integration is all right?" I said, "Bring me some proof and if you can show me it is all right, I might do that." But look at the proof you have. In Washington, D. C., before integration, the academic standing of students was two grades above the national norm. Four years after integration, it was two grades below the norm. Their disciplinary problems rose to an appalling extent. Where policemen had never before been known to visit the school, they visited it each week. Moral degeneracy set in to a degree that would be catastrophic to any people anywhere. Look at the report in 1957 of a health agency in Washington where 184 girls under the age of 16 were pregnant in the public schools. Those were the ones that were on record and the report did not take into consideration those not made a matter of record.

In my concluding remarks I would like to cite one or two examples to show that we do not fight alone on this question in the South. Before Little Rock I was a comparatively unknown fellow. I never sought a fight and tried to get along without them. The mail for the Governor's office was usually a little bundle, perhaps forty letters a day, or at most two, three, or four hundred—depending upon the interest of the people in certain matters of state government. I was amazed the next day after I placed the Guard about Central High School to prevent the almost certain blood-shed that would have ensued. I had placed them there because there had been purchased in Little Rock 1,150 of these umbrellas with metal points which are sharpened into weapons by the colored people. Switch blade knives had been sold in almost every store to the extent that in three weeks a three years' normal supply had been sold. It went on from that to many other things. In one of the press interviews I said that I had not revealed all of these things before. They jumped on me hard. They said, "Now reveal them." I started to tell them and they cut me off quickly.

At Western Union they delivered 600 telegrams the first day, the second day they had doubled the force at Western Union, the third day they tripled it, and put employees on extra hours just to take care of incoming telegrams. I got more than 400 from one little town in Florida. One wire from Louisiana had 2,365 individual signatures. They came from church groups, civic clubs, parents' groups, family gatherings, truck drivers, labor unions—hundreds of them from across the nation, both North and South.

They began delivering mail to the office in sacks and they delivered at least two sacks of mail a day for a period or six or seven weeks. We never counted it, but it runs into the hundreds of thousands of communications.

I got curious about this mail, as to whether it was Southern sentiment or whether it had some bearing nationally, so I had my assistants break down the mail and put it into two groups—mail from the South, including the border states, Texas, West Virginia, and Maryland and mail from other sections of the country. When this mail was broken down I found that the areas outside of the South represented 60 per cent of the mail I was receiving, and it was 95 per cent favorable throughout. That is a conservative estimate, ladies and gentlemen.

Not long ago I went to Peoria, Illinois, to address the Illinois Press Association. Many of those people were looking for my horns, of course, when I got there. They still take *Time, Life* and the *Readers Digest* up there. I told them in the beginning that most of them probably felt that they disagreed with me, but that it would be impossible to determine since it is not humanly possible to place one individual in another's position with full knowledge of all the facts and information. I alked to them more or less along the same lines as I have talked to you. When I finished—and incidentally, it was the largest spring meeting of he Illinois Press Association in its entire history—I got a standing ovaion. Then they came by and I spent forty minutes shaking hands with hem and one after another said, "We are 100 per cent behind you. Just keep fighting." That is the North. That is the intelligentsia. That is not the rank and file. The rank and file are far stronger for us than the so-called intelligentsia, as all of you know.

Then a Republican Senator from Illinois followed me to my room. He spent two hours visiting with me. He told me they had to have a special session of the Legislature to appropriate money just to pay current bills. They are about to go broke, like "Soapy" Williams' Michigan. The senator told me this: they had to make an emergency appropriation of $3,200,000.00 for direct relief. That $3,200,000.00 was divided—$2,600,000.00 of it to Cook County and $600,000.00 for all the other 101 counties of Illinois. Of the $2,600,000.00 which went to Cook County, it was asked how much went to Chicago proper and how much to outlying areas. Not one cent went to outlying areas. What was the reason? He told me of the mothers of illegitimate broods in Chicago who were drawing up to $550.00 per month— more than I used to get for a whole year of teaching school at $70.00 per month. You will find that not only in Illinois. You will find it in other states.

We were taught in our public schools and in our homes and churches that if you sinned you had to pay for it in some manner; we had to pay either by punishment by the law, the school teacher, or our parents, or by society at large in rejecting you for overstepping the bounds of propriety and decency. But, now you can sin and get a check from the government for it. Ladies and gentlemen, do you honestly think in your heart that the republic can long endure with this sort of thing going on? Who is paying the bill? The ordinary, honest, hard-working people who don't sin are being penalized. If there were some way to award these benefits without penalizing us, without making us pay for it, it wouldn't be quite so bad. There is this tendency in this nation, whereby we are being guided by so-called sociologists who never had a practical idea or a practical thought in their whole lives.

I was interested in a panel discussion at the recent Southern Governors' Conference. It was directed by Price Daniel, Governor of Texas. It concerned narcotics addiction, especially among the youth. There were two sides to the panel, two viewpoints. There were sociologists, federal employees, representing the institutions where the patients were taken and treated in an attempt to cure them. This is good and we should do it and be glad to pay for it. But what did these sociologists say? They said, "Oh, if he gets the habit, if a person gets the habit, he is just a poor, unfortunate individual and he can't help it. So we should get some dope and just give it to him right on because he gets the habit."

Price Daniel took the viewpoint that the only way to control the dope addict was to have severe penalties for pushers and to confine, even if against their will, those who become addicts, and make them be cured or pay the price. That is what the law has always been. That is what it always will be, and when we get to the point that we reward indecency and sin, and penalize virtue, thrift, industry, and honesty, why in the name of God, you know we can't continue as a civilization and as a nation.

You know what the sociologists told those unfortunate girls in the schools of the District of Columbia—the 184, in a period of seven months, that were pregnant, and less than sixteen years of age. They said, "Oh, it isn't your fault. It is the result of the society in which we live." Don't you know you can't correct people for wrong-doing without penalizing the individual? Why, if there had been anything to the theory that poor environment and lack of money makes criminals out of people, we would have had the biggest gang of outlaws from the Ozark Mountains that ever infested this nation.

In my ten years as a school teacher I never earned more than $420.00 a year. I never had a car. I had to deny myself to live within my means. My father, when we were growing up (my parents had seven children—all of us lived in a three room house including the kitchen), kept books one year on the amount of cash money that we made. It was so darn scarce we had a special name for it. You know how much money we took in that year? $450.00—less than one mother of an illegitimate child can get for one month now in Chicago. Yet, they say it is environment; it is lack of opportunity. If environment makes outlaws, we from the Ozarks would be worse than Dillinger, Baby Face Nelson and all the rest of them.

Why do people oppose integration? Because there is a close connection between the school and the home. It is closer than the church and the home. Children go to church maybe one day a week. They go to school five days a week. You know the children spend more time with teachers than they do with their parents, in comparison with times that used to be. So it is important that they have good associates. Therefore, the subjects children take and the viewpoint of their teachers is most important. These most valuable intangibles of the human heart can be enjoyed equally by members of both races in their own schools. Put them together, force them together, and you utterly destroy these beautiful associations, and you know it as well as I do. Both should be privileged to enjoy these associations in their respective schools. Yet, the critics have assumed that because you have a white school you don't have a colored school. The greatest need of this day and time is that the truth be known. If proper information is given the people of this nation, we will win our battle overwhelmingly. Because wherever the problem exists people don't like it any better than anyone else. The difficulties in the North are far greater than they will ever be in the South, if they would leave us alone.

I was interested in Gallup's poll recently, which showed how the states outside the South feel about integration. Where there were 10 per cent or less of one race or the other, only 15 or 20 per cent objected to integration. Where the percentage approached a fifty-fifty ratio or there were more Negroes than Whites, then more than two-thirds of all the people outside the South were against integration. We need to let them know the South's problem. Other areas don't have it, but they feel the same about it as the people of the South, as evidenced by the poll.

They say that we fight for a lost cause. They say that we fight for a cause that if not yet lost, will be lost. I fight simply for the Constitution, for the right of the people to govern themselves according to their own inclinations and according to the peculiarities that may exist in their own areas. If you believe in these things, if you believe in the Constitution and the precepts of democracy, the right of freedom of choice, the right to manage your own affairs; if you believe in work, if you believe in decency, honesty, integrity, neighborliness, morality, the sanctity of the marriage vows, and all the things that make us decent Americans and make us a nation of free people, then you may join in the fight. For these are the things for which I fight, with malice toward none, seeking to do injury to no one, but to help all the people within my state, of whatever, race, creed or color, or from whatever walk of life. If these things constitute a lost cause, then we are all lost, and it would be just as well for the Russians to destroy us with atomic and hydrogen power as for us to degenerate into a nation of criminals and immoral, indecent people.

You have done me great honor by allowing me the privilege of addressing you. I apologize for the length of my remarks. I hope that if I have said anything that would offend any one I may be forgiven, for I seek only to serve my people, as Lincoln said: "As God gives me to see the light." I place my faith with the people. When they are ready to reject me I go out freely without malice and without sorrow.

One reason my critics have never been able to shake me completely off balance with all the things I have endured is because I am not afraid of my job the least bit in the world. We must believe in the right of the people to rule, for all of the students of government and of the Constitution say that the intention of the law-giver is the law. Rule is by consent of the governed, and in a democracy the majority must prevail.

Then if we are to have democracy, let the Supreme Court reconsider its grave errors, and as Governor Simpson, a Republican of Wyoming said: "Let them get their cotton-picking hands out of the affairs of Arkansas."

Mr. Quitman Ross of Laurel made a motion that Governor Orval Faubus be made an honorary member of the Mississippi State Bar. Upon second, the motion carried.

Judge Zelma Price of Greenville presented the Report of the Resolutions Committee. Upon motion and second this report was adopted.

Mr. Hugh N. Clayton of New Albany was nominated by Mr. Breed O. Mounger of Tylertown for the office of President of the Mississippi State Bar, and was elected unanimously.

Mr. Gibson Witherspoon of Meridian presented the Report of the American Bar Association House of Delegates Meeting. No action was necessary on this report.

Mr. C. Sidney Carlton of Sumner was nominated by Mr. N. S. Sweatt of Corinth, and Mr. David Cottrell, Jr. of Gulfport was nominated by Mr. Jules A. Schwan of Biloxi, for the office of First Vice-President of the Mississippi State Bar. Mr. Cottrell was elected.

Mr. K. Hayes Callicutt of Jackson was nominated by Mr. James F. Noble, Jr. of Brookhaven for the office of Second Vice-President of the Mississippi State Bar, and was elected unanimously.

The convention then chose as the site of its 1960 meeting, Jackson, Mississippi.

The following Commissioners were elected:

District 1—Cason Rankin, Tupelo

District 2—George E. Morse, Gulfport

District 3—Lester Sumners, New Albany

District 4—Stanny Sanders, Greenwood

District 5—John E. Aldridge, Winona

District 6—E. Harvey Fitzpatrick, Natchez

District 7—Sherwood W. Wise, Jackson

District 8—John C. McLaurin, Brandon

District 9—Herman C. Glazier, Rolling Fork

District 10—Thomas Y. Minniece, Meridian

District 11—John W. Dulaney, Jr., Tunica

District 12—James S. Finch, Hattiesburg

District 13—Wallace Allred, Collins

District 14—Singleton B. Watkins, Jr., Tylertown

District 15—James R. Davis, Columbia

District 16—Ernest L. Brown, Macon

District 17—C. Sidney Carlton, Sumner

District 18—E. K. Collins, Laurel

The Fifty-Fourth Annual Convention of the Mississippi State Bar then Adjourned sine die.

PROCEEDINGS OF THE TWENTY-THIRD ANNUAL MEETING OF THE

JUNIOR BAR SECTION

Held at Biloxi, Mississippi, June 11, 1959

The General Assembly of the Junior Bar Section was called to order at 1:30 P. M., June 11, 1959, in the Buena Vista Hotel, Biloxi, Mississippi, by Mr. K. Hayes Callicutt, President of the Junior Bar Section.

The invocation was delivered by Reverend Clyde H. Gunn of Gulfport.

An address of welcome was delivered by Mr. Stanford E. Morse of Gulfport and was responded to by Mr. James F. Noble, Jr. of Brookhaven.

The first order of the business was the consideration of committee reports.[1] Mr. Eaton A. Lang of Gulfport presented the Report of the Junior Bar Code Study Committee. Mr. James F. Noble, Jr. of Brookhaven presented the Report of the Committee on the Young Lawyer's Seminar. Upon motion and second the above reports were adopted.

Mr. K. Hayes Callicutt of Jackson presented the Report of Activities of the Junior Bar Conference of the American Bar Association. No action was necessary on this report.

Mr. John A. Bellan, Jr. of Jackson presented the Report of the Mississippi Law Institute Committee. Mr. Jay Gore, Jr. of Grenada presented the Report of the Activities Committee. Upon motion and second the above reports were adopted.

Mr. William R. Phillips of Jackson presented the Report on Legal Aid. No action was necessary on this report.

President Callicutt then introduced Mr. Gibson Gayle of Houston, Texas, who delivered the following address.

TODAY'S CHALLENGE

*Gibson Gayles**

The hue and cry against lawyers has always been loud and enduring in nature. It seems that the situation has not improved with time, but, if anything, has worsened. Whenever newspaper or other publicity concerning lawyers appears, it usually involves claims of influence peddling or some other sort of alleged unethical conduct. Legislative bodies are frequently criticized as being dominated by lawyers, as though the people who elect our legislatures were somehow powerless in the matter and were merely helpless victims of domination by their own chosen representatives. We see the lawyer on television almost invariably depicted as a sharpy, such as J. Blackstone Springem, whose practice consists of attempted bribery of public officials, and others who engage in similar illegal practices.

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[1] All committee reports are found in Appendix A.

A poll of the people of Texas taken some years ago indicates that lawyers are looked upon with suspicion and distrust by their neighbors. Few callings were rated so low in the public esteem as the legal profession. The discovery of such information was not surprising to many. Back in 1850, an ungainly looking lawyer from Illinois by the name of Lincoln said:

> "There is a vague belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in, and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief—resolve to be honest at all events; and if in your judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave."

As an example of the seriousness of the current status of the situation, let me report to you a recent illustration. In Texas, there is a formal ceremony before our Supreme Court when young lawyers receive their license to practice law. The newly admitted attorneys are represented by the graduating student who scores the highest mark on the State Bar examination. Recently, in his response to an address by one of our Supreme Court judges, the graduating student who attained this achievement bemoaned the future which awaits one who seeks to embark upon the career of a practicing attorney. Somewhat apologetically, the young man concluded that the practice of law was no place for him and that he would seek his livelihood in some field of corporate endeavor, where he would not be subjected to the rigors and criticism of a jaundiced public eye.

I submit that something has gone tragically wrong with a system which permits such widespread misunderstanding about our profession. To be sure, we have our shysters and miscreants; but there is no calling which is immune from these. Even our brethren of the clergy have those few in their midst who bespeak something other than holiness and righteousness in their everyday conduct.

Having recognized that a serious situation exists, what must we undertake to do about it? Many speeches have been made on the subject before. It is not recognition of the problem that we need; it is action.

As to those in our midst who are unworthy of holding the position of officer of the Court, the burden devolves upon us to clean up our own house; and having cleaned it, to maintain the high standards of our profession with watch dog vigilance. We can hardly expect to appreciate public opinion toward us if we merely wink at the improper practices which take place in our own group and take no steps to rectify them.

As to the public generally, let us accelerate our efforts to inform the people of the many services rendered to society by lawyers. Let us inform our neighbors of the legal aid clinics throughout our country which are manned by members of the Bar without recompense. Let us maintain our campaign against various forms of law practice by laymen, thereby demonstrating that we cherish our privilege to reserve the lawful practice of our profession to those adjudged to be qualified by education and examination; and that we resent encroachments upon this privilege to the extent that we will not stand idly by and allow others to profit by our apathy.

Let us do our best to improve the administration of justice in our minor courts. Many, many more of our citizens know and are familiar with the workings of our traffic courts than any other branch of our judicial system. We must see that justice prevails and that fair hearings are accorded at this level, else our whole judiciary will be marked and tainted by an unfair appraisal. Along these lines, the Junior Bar Conference of the American Bar Association has worked in past years on two different projects to improve the administration of justice in our minor courts. The first of these is a program entitled "Go to Traffic Court as a Visitor, Not a Violator," with which most of you are familiar. The second of them is the Vanderbilt Program for Traffic Safety, now concluded, which consisted of a comprehensive study of the practices now engaged in by the traffic courts of the various states. It is hoped that by raising the standards of our judges at these levels and by removing the fix from the traffic ticket, as well as other salutary suggestions, we may bring about some long overdue reforms at this level.

There is no other field of endeavor in which the legal profession can do more to improve its standing than in the sponsorship of and participation in Law Day—U. S. A. If any system is ever devised by virtue of which international disputes will be finally adjudicated by rule of law rather than force of arms, it will be to our everlasting credit.

Let us also exert all our efforts toward the elimination of the monotonously unfavorable characterization of the lawyer in all fields of entertainment. Let there be disseminated by the public information committees of our bar associations stories such as the two with which I shall close. These stories are taken from an address by an eminent jurist, for whose knowledge of the law and diligent search for the truth in defense of the rights of mankind, I have the profoundest respect. They are the type which, unfortunately, we do not read or hear about these days.

One lawyer I want to tell you about represented a king. This king had come from a long line of kings. There came a time when people in his country became dissatisfied with the kind of government they were getting. Some of these dissatisfied citizens were good, patriotic, unselfish men. Some, unfortunately, were self-seekers who were willing to trample on the rights of others to advance their own social, economic or political advantage. The country I am talking about was France. A man named Malesherbes lived there. He was a lawyer and a conservative in politics throughout his entire life. He served under his king in many governmental capacities. From time to time Malesherbes protested laws that encroached on the religious and political beliefs of people. Malesherbes' suggested remedies to alleviate the suffering of the people were usually discarded. Later the French Revolution began. Malesherbes had then retired from the practice of law; he was over 70; he was safe; his family was safe. The king was arrested, charged with various offenses newly invented to punish him for conduct which had been lawful when done.

Upon the arrest of the king, Malesherbes, who was away in safety, wrote a letter to the president of the National Convention. His letter, which I do not attempt to quote verbatim, was in substance this:

> "Unfortunately, I am busy and do not know whether it is the intention of your body to give the king the right to counsel in the trial which he is about to have. I do not know how to reach him else I would write him instead of you. I am writing to know if you will permit the king to have counsel. When the king was in power he gave me a position of great honor. Now that he is in trouble I tender him my services. Will you please communicate this to the king if it is not contrary to your rules."

Malesherbes was permitted to become counsel for the king. Every day he visited the king in jail, disregarding the advice of friends that he was jeopardizing his own life. He would not believe that France would move so far from order and freedom in so short a time that a lawyer would be punished for honest representation of a client. And so he continued to defend the king before the National Convention. And he did it well, considering that the trial was conducted by a legislative body governed by no rules except those it made from day to day. Of course the vote of the convention was "guilty." The result is well known to all of you.

After the king was guillotined, Malesherbes was arrested. But Malesherbes' accusers did not give him a trial with the protections that courts afford. Zealous revolutionaries would have none of that. Confident that they had a monopoly of wisdom, truth, and virtue, enabling them to provide a utopian solution for all the ills of society, they had done away with court trials, and set up revolutionary tribunals in their place. In these tribunals they had established new procedural rules calculated to bring about sure and certain conviction of those thought disloyal to the revolution or to its ambitious leaders. By these devices an accused could be arrested, denied a lawyer, found guilty on extorted confessions or on the gossip of informers, tried on confessions and rank hearsay evidence, and rushed to his death.

Malesherbes was convicted by the revolutionary tribunal for having served as the king's lawyer. He was sentenced to the guillotine. His family was also convicted. All were carried to the guillotine together. Just before he was executed Malesherbes was required to witness the death of his daughter and his grandchildren, all guillotined becaused they were kin to him. The men responsible for this cruel thing were not all evil perhaps, maybe not even sadistic under ordinary circumstances. But having unrestricted power, and moved by powerful impulses of ambition, prejudice, and fear, they destroyed the established safeguards of society. Because our ancestors feared power like this, they wrote the Bill of Rights. Malesherbes was true to his profession. He walked unafraid to his death. An article about the other lawyer is headed, "Death of Veteran Lawyer Creates Sentimental Void in Court Scene." And it goes on to say: "The August criminal term of this county which adjourned yesterday at Wentworth after nearly a week of mostly minor dealings was probably the first term of Superior Court in this county in 45 years without the appearance of veteran lawyer Wesley M. Jones. Jones, who died here last Saturday after three weeks of illness, began his practice here in 1907. During his 45 years as attorney in this county he had carried on one of the most vigorous and energetic law practices in the legal history of the county. A zealous, determined man with a firmly aggressive chin, an unruly forelock which was grayed but not tamed with age, and a voice which could rake witnesses over the coals of evidence and demand the emphatic attention of juries, he appeared in literally thousands of cases. It was said of him by fellow barristers and laymen alike, that "Jim" Jones will work as hard for a client who pays him a three dollar free, or none at all, as he will for a client who pays him a thousand dollar fee. Whether he ever received a lavish fee is beside the point. He never diminished his labor, he was known as a lawyer who never shirked a case . . . ." Let me repeat that last clause to emphasize it and what immediately follows. ". . . he was known as a lawyer who never shirked a case, and who upheld with remarkable vitality the right of all men to earnest counsel. His face and forceful personality were perhaps more familiar to the jurors on the superior bench of this county than any other of his time."

There is nothing particularly exciting about this story of a lawyer's life and death; nothing to make you think that this man had done anything that would cause any vast difference in the way the world moved along. But for my way of thinking it pictured a man whom lawyers may well emulate. He performed his duty from day to day; he never shirked his duty to take a case because of fear; he gave his clients faithful representation. I am sure that a full biographical sketch would have added—because it is so typical of his type—that he also played his part in the public affairs of his city and his state. Evidently he was a success financially. Why should he not be? Lawyers make their living in the practice. There can be nothing wrong in this so long as one cannot truthfully be called a "lawyer for revenue only."

There surely are many Wesley M. Joneses in these United States today. The people, our neighbors, would unquestionably raise their collective opinions of lawyers as a profession if more were heard of that type of man.

In closing, I should like to say that it has been a privilege to address you today. I hope that we can all look back at the end of 10 or 20 years and see some concrete evidence of improved relations between our profession and the public. Thank you.

President Callicutt then reported on the accomplishments of the past year and the functions of the various committees.

The next order of business was the election of officers. The following officers were duly elected:

Mr. James F. Noble, Jr. of Brookhaven, President.

Mr. Eaton A. Lang of Gulfport, Vice-President.

Executive Committee:

Central District:

Joe Wroten, Greenville
Calvin L. Wells, Jackson
George P. Hewes, III, Jackson

Northern District:

Jay Gore, Jr., Grenada
Frank Riley, Tupelo

J. E. Boone, New Albany

Southern District:

E. C. Ward, Natchez
Harold Robert Barber, Jr., Gulfport
James F. McKenzie, Hattiesburg

The Twenty-Third Annual Meeting of the Junior Bar Section was then adjourned sine die.

APPENDIX A

COMMITTEE REPORTS – SENIOR BAR

REPORT OF THE BUDGET AND FINANCE COMMITTEE

The Committee voted to recommend to the State Bar Commissioners that solicitation for contributions from the members of the Bar be made again for the year 1959-60.

The Committee approved the following budget for submission to the Commissioners of the State Bar for approval:

Office Expense	$2,000.00
Stenographer's Salary	2,700.00
Commissioner's Expense	1,500.00
Junior Bar Section	1,000.00
Committee Expense	1,500.00
Travel Allowance for Study Committee	700.00
National Conference on Uniform State Laws	200.00
Expense of Delegates to Judicial Conference	150.00
Secretary's Salary	4,200.00
Expense of Secretary to ABA, Mid-Winter & Regional Meetings	650.00
Miscellaneous, such as bank charges, exchange, withholding charges, etc.	250.00
Mississippi Law Journal	5,000.00
Dues to National Conference of Bar Presidents, National Conference of Bar Secretaries, and Special Liaison Tax Committee of the Southeastern Region of the ABA	75.00
President's Expense	250.00
Board of Bar Admissions	2,500.00
TOTALS	$22,675.00

The proposed budget for 1959-60 is substantially in line with the budget for the preceding year with the following exceptions:

(1) Commissioners' expense and travel allowance for the Study Committee are increased by $850.00 after consideration of the actual expenditures of these two groups, and in particular, the Study Committee;

(2) The Mississippi Law Journal appropriation has been increased by $1,000.00 due to the fact that the decrease last year of $750.00 had to be restored to meet the actual expenses, and

(3) The Board of Bar Admissions appropriation has been increased by $1,000.00, based on actual expenditures.

The committee notes that the schedule of delinquent members as of May 15, 1959, according to the audit of accounts and financial records for the year just closing, indicates that a total of seventy-one attorneys are delinquent in the payment of dues in the amount of $1,595.00, and that a substantial number of these are delinquent for more than one year. The committee recommends that the Commissioners formulate a definite plan of dealing with these delinquents, and the taking of steps necessary for the collection thereof. The committee also recommends that the Business Manager of the Law Journal be notified of the names of the delinquent members and that the Commissioners authorize that no copies of the Journal shall be mailed to any delinquent member until all back and current dues are paid.

The committee notes that the statutory fee of $25.00 paid by applicants for the State Bar examinations only produced $1,175.00 during the year ending May 15, 1959, while the expenditures of the Board of Bar Admissions totaled $3,430.36, which was necessarily paid by the Mississippi State Bar. The committee recommends that the Legislative Committee consider sponsoring legislation to have the statutory fee increased from $25.00 per applicant to $50.00 per applicant to help pay the aforementioned cost.

At the meeting of the Budget and Finance Committee on June 1, 1959, the foregoing recommendations are being made without benefit of the results of the solicitations of contributions for the coming year. The committee strongly recommends that steps be taken to solicit contributions, and in particular recommends that a letter from the President of the association accompanying the statement of dues be sent out to all members of the association. The committee has given consideration to the question of whether or not the committee should recommend that an increase in the $10.00 annual dues be sought, but the committee feels that final decision of such recommendation should be deferred until the results of the solicitation of contributions for the coming year is known. The budget proposed herein is based upon anticipated revenues of approximately $19,000.00 from dues and $5,000.00 from contributions.

REPORT OF THE CODE STUDY COMMITTEE

Your Study Committee has had three meetings in Jackson during the fiscal year of the Mississippi State Bar, and at each a substantial majority of the entire membership of the committee was present. A number of sub-committees have examined various proposals made to the committee by members of the Bar, and have worked on drafts of proposed bills and recommended legislation.

The committee recommends to the convention of the Mississippi State Bar the following bills for its approval and submission to the Legislature:

ITEM I. An act to amend Section 1876, Mississippi Code of 1942, so as to provide additional methods of serving notice in legal proceedings.

ITEM II. An act to amend Sections 1519 (as amended by Chapter 229, Laws of 1948) and 1848, Mississippi Code of 1942, to provide for the settlement of pleadings and entry of judgment in vacation and to provide for the contents and form of summons issued in actions in circuit courts.

ITEM III. An act to amend Sections 974, 3943, and 3946, Mississippi Code of 1942, so as to provide that the Court or the Chancellor or Judge thereof in vacation may fix and allow reasonable fees for commissioners, referees, auditors and arbitrators.

ITEM IV. An act to amend Section 417, Mississippi Code of 1942, empowering guardian to create, extend or renew encumbrances of an estate.

ITEM V. An act to vest the Chancery Court with jurisdiction to entertain suits for custody and support of minor children, in addition to present remedies.

ITEM VI. An act to amend Section 2735, Mississippi Code of 1942, to limit and clarify the causes for divorce and for annulment, and to establish statutory procedure for adjudication of nullity and annulment of marriages.

ITEM VII. An act to amend Section 875, Mississippi Code of 1942, as amended by Chapter 215, Laws of 1956, and by Chapter 271, Laws of 1958, so as to clarify and fix the time when remedies to enforce certain liens shall cease and have no effect.

ITEM VIII. An act to create a Judicial Council of Mississippi; to establish its powers and duties; to prescribe a method of selecting its membership; and for related purposes.

ITEM IX. An act to amend Section 963, Mississippi Code of 1942, to provide that ex parte petitions for partition may be heard in vacation.

ITEM X. An act to amend Section 1391, Mississippi Code of 1942, so as to provide that decrees against non-resident, absent, or unknown defendants, rendered upon proof of publication only, shall be final and conclusive from date of rendition, unless a rehearing shall be applied for within one year thereafter, or within ninety (90) days if the defendant is served with a copy of said decree within six (6) months of the date of the rendition of said decree and providing for method of serving said notice.

ITEM XI. An act to amend Section 2441, Mississippi Code of 1942, to provide for service of a copy of the indictment of the person indicted.

The following bills were approved by the Mississippi State Bar at its convention in May, 1958. The committee recommends that they again be approved and resubmitted to the next session of the Legislature.

ITEM XII. An act to provide for mental examination of person charged with crime if mental condition is questioned.

ITEM XIII. An act to amend Section 9901, Mississippi Code of 1942, to provide that Sheriff and Tax Collector may back assess property for only a period of seven years.

ITEM XIV. An act to provide the Chancery Court with jurisdiction of proceedings in certain cases, define powers of the Court and to fix venue.

ITEM XV. An act to prescribe a method of reviewing determinations of administrative agencies.

ITEM XVI. (This item was deleted at the convention upon motion.)

ITEM XVII. An act to establish procedure for pre-trial conference in certain courts.

The following items from the report of the Junior Bar Section were incorporated in this report.

ITEM I. An act to amend Section 8699, Mississippi Code of 1942, to provide that persons engaged in the practice of law in this state shall pay dues each year in the sum of twenty ($20.00) dollars.

ITEM II. An act to establish law clerks for the Supreme Court of the State of Mississippi.

REPORT OF THE COMPLAINTS COMMITTEE

On May 18, 1959, the Complaint Committee met in Jackson, and considered five complaints. While we have received countless letters alleging complaints, including over-charging, failure to answer correspondence, co-mingling of clients' funds, only six complaining parties undertook to file affidavits.

One of the complaints was considered by the Bar Commissioners, in November of 1958. Action on that complaint was indefinitely deferred. The remaining five were carefully considered by the committee. In four it was felt that the charging affidavit failed to set forth facts warranting further action. In one a client's charge that an attorney had failed to account for funds collected on behalf of the client was withdrawn when it appeared that the attorney paid the client and affidavit filed by the attorney showed that the failure to account was due to the fault of a collector used by the attorney.

The Complaint Committee is happy to report that no complaints referred to it have been of so serious nature as to warrant recommendation to the commission that disciplinary action be taken.

The committee would like to bring to the attention of the Bar one of its problems, the solution of which is quite simple and lies with the attorneys to whom correspondence is directed by the committee. No attorney likes to have a complaint made against him; upon receiving one, his first reaction is to become angry; he probably suspects foul play on the part of all his enemies; and may decide to ignore the matter. Our admonition for the benefit of future committees is, *Don't ignore correspondence from the Complaint Committee.* The reaction of the committee considering a complaint is to give to the attorney against whom complaint is made the benefit of every reasonable doubt; every effort is made to keep the matters confidential. The committee desires to protect the profession, the Bar and its members—So don't ignore it!

REPORT OF THE CONFERENCE OF LOCAL BAR ASSOCIATIONS

The Conference of Local Bar Associations, a section of the Mississippi State Bar, closed its third year at its annual meeting on June 11, 1959. The officers of the Conference during the past bar year were:

President—Dixon L. Pyles, Jackson.
Vice President—(Northern District) Mrs. Lenore L. Prather, West Point.
Vice President—(Central District) Sherwood W. Wise, Jackson.
Vice President—(Southern District) Kelly J. Hammond, Columbia.
Secretary Treasurer—Mrs. Alice Nevels, Jackson.

The officers elected to serve for the 1959-1960 bar year are:

President—Kelly J. Hammond, Columbia.
Vice President—(Northern District) Jay Gore, Jr., Grenada.
Vice President—(Central District)Sherwood W. Wise, Jackson.
Vice President—(Southern District) Jules A. Schwan, Biloxi.
Secretary-Treasurer—Mrs. Alice Nevels, Jackson.

On May 30, 1958, the Executive Committee met in Biloxi to make plans for a program for the year. Since surveys revealed that lawyers, as a whole, had not maintained the traditional community leadership, the committee recommended the adoption of a program to emphasize the "Role of the Lawyer in Society."

District Bar Conference

As is the established custom, nine District Bar Conferences were held throughout the State during the year, and were well attended by lawyers and their wives in each instance. The speakers at these Conferences were as follows:

Hon. Betty B. Tucker who emphasized the Client-Lawyer relationship;
Judge W. N. Ethridge, Jr., who emphasized the Courts and the Lawyers;
Hon. Sherwood W. Wise who emphasized Defense of Civil Matters;
Hon. Hugh Clayton who emphasized Community Leadership;
Hon. Breed Mounger who emphasized the Procedure of Civil Matters;
Dr. Robert J. Farley who emphasized the Development of Legal Principles in a Changing World;
Hon. C. Sidney Carlton who emphasized the Lawyer and the Bar Association; and,
Hon. William F. Winter who emphasized the Lawyer in Government.

The Vice Presidents were given the responsibility of making recommendations to the President for the appointment of the Chairman of the seven standing committees. The Chairmen who were selected and appointed were as follows:

J. Stanford Terry, Membership—Vicksburg.
Betty B. Tucker, Program—Jackson.

E. B. Williams, Sr., Legislation—Poplarville.
Walter E. Bullock, Professional Fees—Columbia.
Jay Gore, Jr., Professional Ethics—Grenada.
N. W. Overstreet, Jr., Public Relations—Jackson.
J. E. Smith, Professional Economics—Carthage.

The Board of Directors of the CLBA, at the April 28, 1959, meeting, directed the President to appoint a special committee to study the procedure of the Workmen's Compensation Commission and then to recommend to the Conference a comprehensive system of procedure. The President named John A. Craig Chairman of that Committee.

The Board of Directors in their meeting of August 26, 1958, called for the appointment of a committee of Judges to be appointed by the Chief Justice of the Mississippi Supreme Court to study and draft a retirement plan for Judges and submit the plan to the Board at its April meeting. The committee appointed by the Chief Justice was composed of the following:

Justice W. G. Roberds, Chairman
Justice W. N. Ethridge, Jr.
Judge Henry Lee Rodgers
Chancellor William Neville
Judge W. T. Horton

This committee formulated a plan for retirement of Judges and drafted a bill to be presented to the Legislature.

Based upon experience in the work of the Conference and a desire to increase the effectiveness of the Conference, the Board directed that each committee, in addition to the members selected as provided by the constitution, shall have three co-chairmen, one to be selected from each Supreme Court District, the co-chairmen to be appointed by the President, upon the recommendations of the respective chairmen.

On October 3, 1958, Mrs. Grant Williams, Executive Secretary of the Georgia Bar Association met with certain officers and Board members of the Conference for the purpose of discussing the organization, objectives and work of the Mississippi Conference.

During the past year four other states in the nation requested information concerning the Mississippi CLBA. Reports on the organization and work of the Conference were sent to the bar associations of Alabama, Iowa, Maryland and Louisiana. Arkansas has organized a Conference patterned on the Mississippi organization.

The special committee of the American Bar Association established to study the economic condition of the legal profession in the nation requested information from the Conference relative to the study made on the economic condition of the legal profession in Mississippi. Questionnaires were supplied as well as other information pertaining to the Mississippi survey. Much of the work being done by the American Bar in this field is patterned on the Mississippi survey.

During the 1958-59 bar year the Conference assisted in the initial organization and reactivation of eleven bar associations in the State. There are now 55 organized bar associations in Mississippi.

From the reports made by the local bar associations at the nine District Bar Conferences it was learned that the vast majority of the organized associations in Mississippi are now using the fee schedule suggested by the Mississippi State Bar as a basis for fee computation. Following the CLBA program theme of Law Office Management, presented in the 1957-58 meetings, the reports of the local bar officers indicate that a majority of lawyers in the organized associations have installed improved management systems and are using time records.

Few of the local bar associations in this state conducted programs celebrating Law Day—U.S.A. on May 1, 1959. It is suggested that the State Bar consider formulating plans for the observance of Law Day on May 1, 1960, and that through the Conference local associations be urged to conduct programs on the community level.

Constructive public relations programs at both the state and local levels continue to be the outstanding weakness of the profession in this state. Several local associations are achieving good results in this field, but the majority of local bars have no public relations program. The Conference recommends that the State Bar prepare and distribute to the public a booklet describing the function of the State Bar. In addition, the Conference is to prepare a handbook of public relations containing suggestions to local associations for instituting and continuing local progress. The Conference also has the task of establishing a speakers bureau. The State Bar is urged by the Conference to study the possibility of setting up legal forums in the various parts of the State. This means has been used effectively in some states as a method of acquainting the public with the need for the services of lawyers, and to give the public a better understanding of the processes of the law. A program designed to encourage the public to have an "Annual Legal Check-up" should be formulated by the State Bar along the lines of that pioneered by the Michigan State Bar. This program is similar to the annual medical check-up in its emphasis on the importance to one's legal affairs.

The Conference urges the formation of a Mississippi State Bar Ladies Auxiliary, and the formation of auxiliaries in local associations. Such an association would be beneficial to the profession.

At the April 28, 1959, Board of Directors meeting, Judge W. N. Ethridge, Jr., presented a plan for the establishment of a permanent Judicial Council. The Board approved the plan and Judge Ethridge delivered the principal address on this subject to the annual meeting of the Conferences. The Conference urges the enactment of legislation to create a permanent Judicial Council composed of Judges, lawyers and laymen as a means of improving the administration of justice in Mississippi.

At the June, 1957 convention, the Conference recommended the building of a Department of Justice Building to provide adequate facilities for the Supreme Court Clerk, the Supreme Court, the law library, the Attorney General's Department and the Mississippi State Bar and its sections. A special committee was appointed to study, implement and draft legislation to be presented to the legislature for the construction of such a building. The committee carried out the instructions of the Bar in this respect. However, the bill was not presented to the legislature. The Conference recommends that the State Bar again make an effort to have the bill introduced in the Mississippi Legislature and support the passage of the same.

It became increasingly apparent during the past year that more adequate facilities and additional funds are needed to provide the services traditionally rendered by the State Bar and its sections. The Conference recommends that the Mississippi State Bar support legislation to amend Section 8699 of the Mississippi Code of 1942 so as to raise the dues of its members to $20.00 per annum.

A special committee was appointed by the President of the Conference to make a study of the procedure of the Workmen's Compensation Commission, and to recommend a comprehensive System of Procedure. The committee reported that the need for such study was recognized but that the matters proposed for study are too voluminous and complex for the committee to make the study in the time allotted. Upon the recommendation of the committee, the conference recommends to the Mississippi State Bar that a special committee be appointed to make a full and exhaustive study of the procedure for handling compensation cases before the Mississippi Workmen's

Compensation Commission, the Circuit Courts and the Supreme Court, to make recommendations, as, in the opinion of the members of the committee, would serve to provide the means for a more expeditious and judicial manner of processing and disposing of workmen's compensation cases before the Mississippi Workmen's Compensation Commission, the Circuit Courts and the Supreme Court, and to make recommendations relative to statutory changes that would be needed, if any, which would be deemed necessary to accomplish the needed changes.

The Conference assisted in the compilation of the manuscript entitled "Fee Computation and Law Office Management." The Conference recommends the publication and distribution of this booklet to all lawyers in Mississippi.

The Board of Directors of the Conference directed that a recommendation be made to this convention that legislation be enacted by the Mississippi Legislature requiring the association of at least one Mississippi lawyer in all actions in this state wherein an out of state lawyer is counsel in order for such out of state counsel to appear before any Mississippi Court, or any quasi-judicial or administrative body of this state; and that federal courts and agencies in Mississippi be requested to adopt the same as a rule of practice and procedure. The CLBA recommends that the State Bar draft such a bill and secure the introduction of the same in the next session of the Mississippi Legislature.

REPORT ON THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES MEETING

The February meeting of the House of Delegates in Chicago was 100 per cent attended by state delegates.

The most far reaching and certainly the most favorably received action of the House of Delegates in the last decade was the passage of resolutions urging legislation to tighten the nation's anti-subversive laws. There was one voice raised against these five resolutions because its language was critical of the U. S. Supreme Court, but all five resolutions were passed almost unanimously. Syndicated columnists from coast to coast, as well as nationally known cartoonists, praised the House's action for the strong position taken. Senator Eastland in his able address referred to this action and has introduced legislation to enact these resolutions into law in our national Congress.

Our candidate for ABA President, John C. Satterfield was defeated by a very close vote. Many of his friends from all sections are urging his nomination in February, 1960.

John Satterfield's report as Chairman of the Special Committee on Economics of Law Practice was well received and John was unanimously applauded for his fine report. The American Bar Association's summary of activities lists the accomplishment of this committee on page one of its annual report as being the most outstanding contribution to the grass-root lawyer ever accomplished by the American Bar Association. You have all seen one of the pamphlets published, "The 1958 Lawyer and his 1938 Dollar," and other pamphlets which are to be released on law office management and our economic condition. Old-timers advised that the loudest applause ever to greet an announcement occurred when the Board of Governors announced that it had dropped Chief Justice Earl Warren from the rolls of the ABA.

As you probably know, the annual meeting of the American Bar will be held in Miami, August the 23rd to the 28th. If you cannot attend this meeting, be sure to attend the regional meeting which will be held in Memphis at the Peabody, November the 11th to the 13th. Ed Kuhns and Charlie Morgan are co-chairmen and largely through the efforts of your state Bar delegates, this program has been arranged on these dates so that those attending can attend the Ole Miss-Tennessee game Saturday, November 13. Buses will be provided to take the Bar to the stadium and all in attendance will sit as a group. An outstanding program has been arranged and we feel that everyone will enjoy and benefit from the fellowship of this regional meeting.

REPORT OF THE COMMITTEE ON JUDICIAL RETIREMENT

Your Committee on Judicial Retirement has carefully considered the recommendations of the State Conference of Judges on Judicial Retirement, which are attached as an Appendix to this report. Your committee has also conferred at length with Mr. W. R. Hough, Executive Secretary, Public Employees Retirement System of Mississippi, and with Mr. Walter R. Bivins, member of the Board of that System.

The present judicial retirement system in Mississippi is entirely inadequate. Your committee has seriously considered the advisability of a separate and independent judicial retirment system, but finds that it is preferable for all concerned to seek an amendment to the existing Public Employees' Retirement System.

We cannot expect our judiciary to continue to attract men of the highest ability unless some improvement is made in the retirement compensation received by a judge after he has devoted a substantial part of his career in service to the State. In order to correct the existing deficiencies without endangering the existing Public Employees' Retirement System, your Committee makes the following specific recommendations:

(1) That Chapter 547 of the Mississippi Laws of 1958, and any other statutes pertinent thereto, be amended so as to increase the assessable average compensation under the Public Employees' Retirement Act from the present figure of $7,800.00 to a sum not in excess of $15,000.00.

(2) That a supplementary appropriation bill be enacted to supplement the present retirement benefits which might be received by a judge retiring within the 60 month period required by Chapter 547 of the Mississippi Laws of 1958 so as to make the aggregate of such retirement benefits the same as the retirement benefits which would be received by such judge after 60 months of service under the proposed increased average compensation figure of not in excess of $15,000.00.

(3) That a bill be enacted amending the present Public Employees' Retirement Act so as to authorize State employees, including judges, who have been previously elected not to come under the system, those now elected to come under the retirement system, to subject themselves to regular employee contributions and to receive the benefits of the system, including prior service credits, subject to the following conditions and limitations:

(a) That a limited time, not to exceed six months, be allowed for such action.

(b) That four years service after the election to come under the retirement system be a condition precedent to the right to retirement benefits.

(c) That full contribution of all amounts that would have been paid to the system be required if credit is to be allowed for the time between the passage of the Public Employees' Retirement Act and the election to come under the retirement system.

(d) That if full contribution to the retirement system is not made under paragraph (c) above, such person shall be entitled to credit from the date of his election to come under the retirement system plus prior service credits which predate the passage of the Public Employees' Retirement Act.

(4) That the President of the Mississippi State Bar be requested to appoint a committee of lawyers and judges to present these recommendations to the Public Em-

ployee's Retirement Board and to cooperate with said Board in preparation of the necessary legislation to effect these recommendations and to cooperate with said Board in the presentation of same to the Legislature at the next legislative session.

Your committee recognizes that the proposals provide only a modest increase for our judiciary under the retirement system, but it feels that it is a step in the right direction which should be taken immediately with the full cooperation and backing of our State Bar.

Recommendations of State Conference of Judges on Judicial Retirement

Pursuant to the decision of the State Conference of Judges at its January, 1959, meeting, Chief Justice Harvey McGehee appointed this Committee of the State Conference of Judges for the purpose of studying and making recommendations to the Bar concerning needed improvements in Mississippi's judicial retirement system.

Members of the Committee have obtained copies of recent judicial retirement statutes from Washington, New Mexico, and other states. The American Judicature Society has been especially helpful in furnishing us with factual information concerning the ways other states are meeting this problem. The Institute of Judicial Administration has also made available to the Committee facts which it has compiled. Two members of the Committee have had two lengthy conferences with Mr. W. R. Hough, Executive Secretary, Public Employees' Retirement System of Mississippi, and Mr. Walter R. Bivins, Member of the Board of that System. After these preliminary studies, the Committee met on Thursday, February 19 and considered carefully the issues and its recommendations. Messrs. Hough and Bivins appeared at that meeting at the Committee's request, and answered the inquiries there made. Throughout our studies they have been most helpful and cooperative.

A separate and independent judicial retirement system, applicable to all judges in the state courts of record, would be the ideal system. However, after careful consideration we have concluded that, considering all the circumstances, it is preferable that the existing Public Employees' Retirement System be amended and improved so as to increase the retirement benefits for judges and other state officers in similar salary categories.

The present judicial retirement system in Mississippi consists of two parts: (1) The judges and other state employees are under the federal social security system, Miss. Laws 1952, Chapter 299, being Code Sec. 7446-01 to 7446-10; and (2) supplementing social security, the judges are members of the Public Employees' Retirement System, first created by Miss. Laws 1952, Chapter 299, being Miss. Code Sections 7446-11 to 1446-27, as amended by Miss. Laws 1958, Chapter 547.

Under the present system, a judge with 34 3/4 years of service would draw from state retirement an annuity of $3,257.81 per year, and he and his wife would draw from social security $2,286.00, or a total of $5,543.81 per year, or $461.98 per month. One signififcant aspect of the present state System is that substantially all this income would be exempt from state income taxes. Most of it, in the example stated above, would be exempt from federal income tax.

At present rates, a judge at age 65 and with 10 years service would receive $116.00 per month, and his dependent wife at age 65 would receive $58 per month, or a total of $174.00 per month from social security, plus $50.00 per month from the state retirement annuity supplement, or a total from all sources of $224.00 per month. This is approximately 20 per cent of present salary for a Supreme Court Judge, and approximately 25 per cent of present salary for circuit and chancery judges.

At present rates, with 20 years of service, a judge would receive social security as above, with $100.00 per month from the state retirement annuity supplement, or a total of $274.00 per month. This is approximately 25 per cent of the present salary of a Supreme Court judge, and slightly less than 30 per cent of the salary of a chancery or circuit judge.

These benefits are not adequate, but they are substantial. Improvement of the present system would increase these benefits, and also retain several important features. (1) As previously stated, substantially all of the income would be exempt from state income taxes and federal income taxes. (2) The present system allows to judges and others the benefit of prior service with the state. Practically all of the judges have a long record of many years of prior service as state employees, in such capacities as attorneys for boards of supervisors, or municipalities, county and district attorneys, state legislators, and circuit and chancery judges. The creation of a new and separate system could hardly, with effect, give them credit for this prior service. (3) Moreover, the membership of the present Public Employees' Retirement System includes all of the state employees in all salary categories, being about 65,000 in number. Protection and improvement of the present system should and probably would have the support of all of the state's employees. On the other hand, the creation of a new and separate system for judges would not have such wide-spread support, would have to rely largely on the lawyers in the state, and perhaps would have considerable opposition as an attempt to damage and divide the present state system. (4) Another benefit under the present system consists of survivorship benefits under social security. For a judge with a wife and dependent children, these survivorship benefits are considerable. Some separate state systems contain pensions for widows but apparently none contain benefits for dependent children. A separate system without these existing benefits under social security would result in a less valuable retirement system.

After having analyzed carefully these and other considerations, this Committee has concluded that the best and most desirable method of improving judicial retirement in Mississippi is to improve the present system. The principal statutory change would be to amend Sec. 12 (e) of Chapter 547 Miss. Laws 1958 and related statutes, in order to increase the maximum assessable amount from the present $7,800 of the employee's salary to not exceeding $15,000. We understand that this amendment is actuarially sound, and is desirable anyway in order to equalize the salary percentage of retirement benefits received by many elected and appointive state officers with those of employees in lower salary categories. The effect of such an amendment would be that, for a judge at age 65 and with 10 years of service, social security benefits for him and wife would be $174.00, plus $128.75 for the state supplement, or a total of $302.75.

With twenty years of service, the state supplement would be $257.50 per month, which, added to the social security of $174.00, would be a total of $431.50 per month.

A judge at age 65 and with 30 years of prior service, would receive $386.25 from the state annuity supplement, which, added to the social security of $174.00 for him and wife, would make a total of $560.25 per month, which is still slightly under 50 percent of his present salary.

The figures under the proposed amendment demonstrate the importance of prior years of service. The more prior service, the more benefits received. It will be noted that the retirement benefits for a judge with 30 years of service, under the proposed amendment, would be slightly less than 50 per cent of his salary. Nevertheless, your committee thinks that these added benefits would represent substantial increases over the present system, and would be preferable to undertaking a separate and independent retirement system. It is manifest that an amendment of the suggested type would increase substantially retirement benefits under the present system.

A second needed statutory change involves this consideration: There may be several judges in the state who would wish to retire within less than five years, and receive retirement benefits on the increasd basis. Yet under Section 12 (e) of the Act, as amended by Miss. Laws 1958, Chapter 547, they would be unable to do so, since they must have earned compensation in the present amounts of their salaries for 60 successive months of service. A separate bill could properly be drafted to support an independent, supplemental appropriation to cover cases of that type, which would enable such judges so retiring in less than five years to receive the proposed increased retirement benefits. There is a precedent for this in a similar, supplemental appropriation made several years ago in the teacher's retirement transfer to the present system.

A third problem arises with reference to those judges and other elected state officials who, in 1953, or subsequently elected not to come under the retirement system, for sufficient reasons of their own, such as that they did not then intend to remain in public service. No doubt many of these elected officials would now desire to elect to come under the state retirement system and pay out of their monthly salaries the employee's contribution. There is no way they can do that now. We recommend legislation which would enable elected state officials to elect at this time to come under the retirement system, if they so desire.

We, therefore, recommend as follows:

(1) The amendment of Chapter 547, Miss. Laws 1958, and any other statutes pertinent thereto, so as to increase the assessable average compensation under the Public Employees' Retirement Act from the present figure of $7,800.00, to the sum not in excess of $15,000.00.

(2) The enactment of a supplementary appropriation bill to supplement the present retirement benefits which might be received by a judge retiring within the 60-month period required by Chapter 547, Laws of 1958, so as to make the aggregate of such retirement benefits in such few cases the same as retirement benefits which might be received by such judges after 60 months of service under the proposed, increased average compensation figure of not in excess of $15,000.00.

(3) The enactment of a bill, amending the present Public Employees' Retirement Act which would authorize elected state officers, including judges, who have previously elected not to come under the system, to now elect to come under the retirement system, to subject themselves to regular employee contributions, and to receive the benefits of the system, including prior service credits.

(4) We further recommend that the State Conference of Local Bar Associations and the Mississippi State Bar approve these suggested improvements in judicial retirement. We think that the initiative and the principal impetus to accomplish this program should necessarily and properly be with the lawyers of the state rather than the judiciary.

(5) After this program has been approved by the State Conference of Local Bar Associations and the Mississippi State Bar, the president of the Mississippi State Bar should be requested to appoint a committee of lawyers and judges to present these recommendations to the Public Employees' Retirement Board and to the legislature, and to use all reasonable efforts to enable these proposals to be enacted into law at the next legislative session.

REPORT OF THE JUNIOR BAR SECTION

I. The Young Lawyers' Seminar

After three years of preliminary work, the Junior Bar Section of the Mississippi State Bar successfully held its First Annual Young Lawyers' Seminar at Millsaps College in Jackson on September 5th and 6th, 1958. The Young Lawyers' Seminar is a Seminar to "bridge the gap" between the theory learned in Law School and the actual handling of a law practice. The Seminar is designed to give the young lawyers some of the "know-how" which ordinarily could be learned only after several years of practice.

Lectures and printed outlines, with forms, on the mechanism of the courts, defense of criminal actions, wills and estates, domestic relations, negligence actions, account collection and workmen's compensation were given by various attorneys from all over the state. The Seminar does not attempt to teach the young lawyer any substantive law, but attempts to teach him some of the practical aspects of the actual practice of law. The First Annual Young Lawyers' Seminar was fortunate to have the following attorneys to participate in the program:

(1) Mechanism of the Courts—Curtis E. Coker, Jackson, Mississippi.
(2) Defense of Criminal Actions—John A. Travis, Jr., Jackson, Mississippi.
(3) Wills and Estates—Tom Leslie Darden, New Albany, Mississippi.
(4) Domestic Relations—Jay Gore, Grenada, Mississippi.
(5) Negligence Actions—Joshua M. Morse, III, Poplarville, Mississippi.
(6) Accounts Collection—Carl E. Guernsey, Jackson, Mississippi.
(7) Abstracts and Titles—Harold Robert Barber, Jr., Gulfport, Mississippi.
(8) Workmen's Compensation—Russell D. Moore, III, Jackson, Mississippi.

The Seminar Committee Chairman was Mr. James F. Noble, Jr., Brookhaven, Mississippi, who did a magnificent job on the First Annual Young Lawyers' Seminar.

A fee of $25.00 was charged to cover the expenses of the Seminar. Questionnaires were presented to the participants for their frank rating of instruction. The participants were requested not to sign the questionnaires but to give their frank opinions. These questionnaires have proved most helpful in directing the Second Annual Young Lawyers' Seminar which will be held in the early part of September of this year.

I hold in my hand a brochure of the First Annual Young Lawyers' Seminar which shows you some of the work and effort which was given to this program. I am filing this brochure with this report in order that the same may become a permanent part of the records of this association.

II. Code Study Committee

The Code Study Committee of the Junior Bar Section of the Mississippi State Bar has recommended two bills which the Junior Bar Section would like to have the privilege of attempting to get enacted into laws during the next session of the Legislature. The first of these bills is an act to establish law clerks for the Supreme Court of the State of Mississippi. This proposed bill would allow the Supreme Court to appoint three law clerks, who would assist the Court in research and other activities usually performed by law clerks. The Junior Bar Section feels that such clerks would relieve the case load that is slowly but surely building up in our Supreme Court. The Junior Bar also believes that such clerks will be most beneficial to judges relieving them of the burden of researching the law, which in turn, will give them more time for conferences and deliberations. The senior partners of the various law firms use associates to assist them in briefing; therefore, the Junior Bar Section feels that law clerks can very easily perform this service for our Supreme Court. A great many of the States now have law clerks and utilize them to the greatest advantage.

Under the proposed bill of the Junior Bar Section the law clerks would receive a salary of $5,500.00 per year, payable in equal monthly installments. The law clerks would not be eligible for reappointment.

The proposed bill would also provide a great opportunity for three graduating law students each year. This would tend to benefit both the bench and the bar during the coming years.

The second proposed bill sponsored by the Junior Bar Section of the Mississippi State Bar is an act to raise the dues of each member of this association to $20.00 per year. The Mississippi State Bar is under-financed and something must be done if we are to continue to function as an efficient organization. The Mississippi Bar approved such a proposed bill at its last session, but the Legislature failed to enact the measure into law. The Junior Bar Section feels that it should be allowed to attempt to get this proposed bill enacted into law during the next session of the Legislature. The Junior Bar Section believes that if the Junior Bar members can recommend and pay $20.00 per year then the Senior Bar members should again go along with the proposal.

Under the present "set up" the financial condition of the Bar depends upon donations of the members of the Mississippi State Bar. Without the donations given by the various members last year the association could not have operated. This is a deplorable condition. The Junior Bar Section wants to try to remedy this condition by providing permanent financing for a strong Bar Association.

III. Membership Drive of the ABA

The Junior Bar Conference of the American Bar Association conducted a membership drive in which the Junior Bar Section of the Mississippi State Bar participated. A personal contact campaign was held in this State where a great majority of the non-members of the ABA were personally contacted. Mississippi ranked ninth, when compared with the other States, in reaching their goal in this campaign. The Junior Bar Section has a right to be justly proud of the record it made during this campaign.

IV. Injunction Against Nine Special Bar Applicants

Nine people were instrumental in getting special acts passed by the Legislature which permitted them to take the Mississippi State Bar examination without qualifying under the general statutes as to residence and qualifications. The Junior Bar Section had a member on the special committee appointed by the Board of Bar Commissioners to take legal proceedings against these people. The Committee consisted of M. M. Roberts, Thomas Y. Minniece, William C. Keady, Will S. Henley and K. Hayes Callicutt. The Junior Bar Section assisted the Committee by doing some of the leg work and especially Mr. M. M. Roberts, who did a yeoman's work for this Committee. The suits were brought to a successful conclusion by the parties being permanently enjoined from taking the bar examination under such special acts. This procedure should be followed in the future if any other cases arise.

V. Activities Committee

For the first time the Junior Bar Section appointed a Committee which had as its primary purpose the aim of acquainting the graduates of the University of Missippi School of Law and the successful applicants of the Mississippi State Bar Examination with the activities of the Junior Bar Section of the Mississippi State Bar. The Junior Bar Section thinks that more people should be interested in the activities of the Mississippi State Bar. The Junior Bar felt that one of the best ways to do this was to have a planned program to get the young lawyers interested in Bar activities. The Junior Bar feels that this Committee should be continued through the years to stimulate activities of the new members of the Bar Association.

VI. Thirteenth Annual Mississippi Law Institute

The Junior Bar Association of Jackson co-sponsored, with the University of Mississippi School of Law, the 13th Annual Mississippi Law Institute. A very interesting and educational program was presented by Mr. Melvin Belli and his associate, Alva Brumfield. Everyone who attended this program saw one of the better-known plaintiff's attorneys in action.

The banquet speaker was Mr. Erle Stanley Gardner, better known as Perry Mason.

VII. Unauthorized Practice of the Law

This Committee made a study of the representation being had before various State boards and commissions. The Committee feels that this study should be continued as there is some evidence that various litigants are being represented before such boards and commissions by people who are not attorneys. The Junior Bar Section feels that an educational program along this line will suffice to stop this unauthorized practice of the law.

VIII. Legislative Committee

As the Legislature did not convene in a regular session and was not called into a special session, the legislative Committee of the Junior Bar Section of the Mississippi State Bar did not have any report to make except to recommend that the Committee be continued in order to be available for action when the Legislature convenes in January of next year.

IX. Traffic Court Conference

The Standing Committee on Traffic Court programs of the American Bar Association has contacted the Junior Bar Section in reference to the desirability of holding a judicial conference for Mississippi judges and prosecutors who handle traffic court cases. The Junior Bar Section believes that better public relations are needed in the field of traffic cases. Most people who violate traffic regulations and are fined because of such violations feel that the city policeman, the highway patrolmen, or the county officials have something against them. When you bring this already irritated man to an average Justice of the Peace you do not make a very good impression on him as far as the law is concerned. The Junior Bar Section has agreed to attempt to co-sponsor this program with other organizations in the State. A Committee chairman has been appointed, who will be responsible for appointing his own committee.

In conclusion, I would like to recommend that we obtain more Junior Bar Associations on the local level and more coordination from the State headquarters with the local Junior Bar Association. I feel that a special committee should be appointed to study and make a full report to this organization at the next annual meeting.

REPORT OF THE LAWYERS' BUSINESS AFFAIRS COMMITTEE

Your President, in his appointment of the committee gave the following objectives and instructions:

> "If we can revitalize fee computation, coordinating the same with law office management work and succeed in placing the work on the desk of every lawyer in

Mississippi to the end that the same may be placed in practice many months before the convention, I will be happy if we should fail in all else . . . ."

"In my humble judgment, it is the most important committee of the Bar. As stated before, I hope that you will be able to place a law office management pamphlet in the hands of every attorney in Mississippi, and particularly in the rural areas."

I regret to report that these objectives have not been fully achieved. Lack of financing, due to the inadequate dues structure of the Mississippi State Bar, has prevented publication of the work of the committee, though the same has been ready for publication since December, 1958.

At the outset of this report I wish to pay tribute to the interest and unusually effective activity of the members of the committee. At each committee meeting a large majority of the members was present. It has been an inspiration to serve with such a fine, diligent, and able group.

After appointment of the committee, preliminary plans were developed by correspondence prior to the first formal meeting.

This first meeting was held on August 26 and the general outline of the committee work was developed and approval was given to approximately one-half of the overall project. Special assignments were made to individual committee members for the drafting of addtional sections of the committee manual.

These were completed and combined into a tentative manual before the next meeting of the committee which was held on October 3. At that time final approval was given to the corrected manual.

The entire work of the committee is represented by the completed manual entitled: "Fee Computation and Law Office Management." It is divided into three parts under the following heads:

Considerations Affecting Fee Computation;
Suggested Fee Schedules; and
Law Office Management.

The overall manual is based upon two prior publications by the Mississippi State Bar and its sections. The first is the publication distributed in 1956 and revised in 1957 and entitled "Suggested Basis of Fee Computations." The second is a mimeographed manual prepared by the Conference Bar Associations, a section of the Mississippi State Bar, entitled: "Law Office Organization and Management." The committee incorporated considerable new matter and the earlier publications were enlarged and revised.

The earlier suggested fee schedules have been brought up to date and are believed to be practical for application throughout the entire state. Several former groups have been combined, while others have been added. Schedules covering the following categories have been prepared and incorporated.

General Services;
Service Respecting Titles;
Estates;
Retainer Fees;
Domestic Problems;
Criminal Cases in State Courts;
Contingent Fees in Civil Cases;
Civil Cases in State Courts;
Cases in United States Courts;
Depositions;
Eminent Domain Courts;

Cases Before Administrative Bodies;
Labor Relations Cases;
Bankruptcy Matters; and
Tax Matters.

The section on law office management has been prepared on a practical approach and the forms and procedures recommended are all ones which have been actual and effective service in at least one Mississippi law office. The viewpoint is that of the small partnership or individual practitioner office and in this respect differs from almost all previous publications on the subject.

Consideration is given to the physical layout and appearance of the office and the floor plans of two successful offices are shown. One of these is the plan of a large metropolitan firm with offices in an existing building. The other is of a relatively small town practitioner and shows the manner in which an existing building was completely remodeled to meet the needs of the lawyer.

The section on the client relationship is particularly important because of the stress laid upon public relations and methods for improving the relationship between the public and the individual practitioner as well as between the public and the bar generally.

The third part of the Management section contains a practical, recommended system for filing, time records, financial records, and costs accounting. It is the belief of the committee that the adoption and use of the recommended procedures will result in a higher "take-home pay" to the individual lawyer through making more effective use of his time and through reducing his costs of operation.

The fourth part of the Management section is, we believe, one of the most outstanding features of the manual. It deals with the tax problems of the practicing lawyer and gives valuable information and advice to the lawyer regarding his tax problems. Your committee earnestly recommends that funds be made available for the publication of this manual for its distribution to every practicing lawyer within the state, believing that its study and use will result in the improvement of the economic condition of the Mississippi Bar, both individually and collectively.

Again allow me to pay tribute to the outstanding energy and effectiveness of the individual committee members in the discharge of the assigned duties of the committee. It has been both a privilege and a pleasure for the chairman to work with these dedicated members of the profession.

REPORT OF THE MEMORIAL COMMITTEE

The Chairman of the Committee presented the following resolution.

"In the measureless realm of Time, how brief is the span of Life."

Once more we pause in our busy rush of pressing problems to honor the memory of those of our profession who have died during the past year that has gone.

We, too, share in the sorrow of separation from loved ones and mingle our sympathetic tears with those who mourn their passing. We recognize the loss of great leadership and of fine craftmanship that has occurred in the going away of those who are with us no more.

Each of them contributed something good and something great to the total of achievements of our day and age. Their humble service and devotion to duty will be laid up in the archives of the temples of justice and written on the hearts of our fellow men until time shall be no more. Quite often in our feverish haste in this frantic existence, we fail to say to those who labor with us how much we love and honor their contributions to the service each is trying to render until we find that our friend has quietly slipped away. Like all men, they were human and subject, therefore, to the fickleness and foibles of fortune, but each was an honorable member of a noble group who constantly press toward that high goal of duty well done in the cause of truth, justice and mercy.

May we constantly emulate and seek to improve the noble virtues of each of these, our Brethren, whose presence we sadly and lovingly miss.

Those who have entered upon the Great Adventure of a greater and wider knowledge and experience are:

James D. Arrington, Collins
Elijah C. Barlow
  158 West Enterprise Street
  Brookhaven
Robert Montgomery Bourdeaux
  Meridian (former Circuit Judge)
James Benton Boyles, Batesville
Maxwell Bramlette, Woodville
Joseph E. Brown, Natchez
Arthur Bruce, Sr., Greenwood
H. Newell Bruner
  457 East Ridgway Street
  Jackson
Harry M. Bryan
  1504 Devine
  Jackson
Fred M. Bush, Sr., New Hebron
Millard Mundell Bush, Sr.
  Laurel
Jack Deavours, Laurel
Lamar F. Easterling
  803 Arlington
  Jackson
Kenneth F. Edwards, Jr.
  Box 216
  Greenville
George H. Ethridge, Jackson
  (Judge, Supreme Court)
H. P. Farrish
  141 N. Hinds
  Greenville
John F. Frierson, Columbus
H. T. Huber, Canton
Jay R. Jameson, Jr.
  Abilene, Texas
Charles S. Mitchell
  Pascagoula
Forest Marvin Morris, Sr.
  Hattiesburg
William Malcolm Mounger
  3833 Old Canton Road
  Jackson
Oliver B. Ormond, Forest
Miss Anne Rylee (Willie Yeates)
  4000 Cathedral Avenue, N. W.
  Washington
Jack E. Stuart, Hattiesburg
J. Dudley Stennis, Jr.
  Biloxi
William J. Vollor
  927 Bowman Avenue
  Vicksburg
William Calvin Wells
  1333 North State Street
  Jackson
T. J. White, Gulfport
Robert Dunbar Wigginton, Gulfport
Olen E. Wiley, Ruleville
Thomas Jefferson Wills
  501 Bay Street
  Hattiesburg
AND OTHERS.

NOW, THEREFORE, BE IT RESOLVED by the Mississippi State Bar in Memorial Session assembled before the Bar Association of Mississippi on this the 13th day of June, 1959, that we seek to rise to the challenge of all that was good and noble and true in the lives of each of these departed friends and brothers. That we now hereby record the great loss that we have sustained in common with our Nation, our States, and all our fellowmen in their passing. That we extend our sincere sympthy and abiding love for the comfort of their families and loved ones.

Be it further resolved that copies hereof be forwarded to the families of each of our departed friends and brothers, and a copy requested to be entered in the

Minutes of the Supreme Court of Mississippi and the permanent records of the Mississippi State Bar.

> "Shall claim of death cause us to grieve,
> And make our courage faint and fall?
> Nay; let us Faith and Hope receive;
> The rose still grows beyond the wall,
> Scattering fragrance far and wide,
> Just as it did in days of yore,
> Just as it did on every side,
> Just as it will forevermore."

REPORT OF THE EDITORIAL BOARD OF THE MISSISSIPPI LAW JOURNAL

General

The publication of the October, 1959 issue of the *Mississippi Law Journal* will mark the completion of the thirtieth volume. With the publication of the December, 1959, issue, the *Journal* will commence the thirty-first year of uninterrupted publication.

The *Journal* has a circulation of approximately 2500 copies per issue, and, at the present time, is published four times a year during the months of December, March, May and October. The October issue is devoted exclusively to the publication of the proceedings of the Mississippi State Bar Convention and the roster of members of the Mississippi State Bar Association.

Buildings and Facilities

Due to the construction of the recently completed Law School annex, it was necessary for the office of the *Mississippi Law Journal* to be moved to the basement of Lamar Hall. Future plans concerning the permanent location of the *Journal* offices are indefinite.

Issues Published Since Last Convention

Since the the 1958 convention, the *Journal* has published five issues. The first was the Special Issue containing the Revised Rules of the Supreme Court of Mississippi and Judge Roberds outstanding article on Oral Arguments and Written Briefs in the Supreme Court. This Special Issue has been favorably received, and it appears from the number of letters received from members of the Bar that the publication is of practical value.

A new editing policy was formulated and first used for the publication of the October 1958 issue containing the Proceedings of the State Bar. Due to the number of complaints received because of necessary deletions made in various speeches and committee reports, the following policy was adopted. The President of the Mississippi State Bar Association appointed a committee to edit the October issue of the *Journal*. This committee consisted of (1) the President of the Mississippi State Bar Association, (2) the Chairman of the Law Journal Committee, (3) the Faculty Advisor of the Law Journal and (4) the Editor of the Law Journal. This policy will continue in effect for the publication of the October 1959 issue.

The December, March and May issues were published on schedule and contained the customary student work and several leading articles.

Future Plans

The *Journal* is planning to publish a Special Issue in August 1959 on Pleading and Practice in the Circuit Court of Mississippi. A topic outline was formulated by Judge William N. Ethridge, Judge Claude F. Clayton and the Honorable Lester G. Fant. Articles to be contained therein are to be contributed by our Circuit Judges and other outstanding writers. It is felt by the *Journal* that a valuable service could be rendered to the Bar by the publication of such an issue. This issue will be furnished at no additional expense to our present subscribers.

In addition to the aforementioned Special Issue and the regular four issues, the Cumulative Index for Volumes XXI-XXX will be published during the ensuing year. As announced in the 1958 Report to the Bar Convention, a conservative estimate of the length of the Index is a hundred pages and the estimated cost of printing will be approximately $1,500. This expenditure will be in addition to the cost of the regular four issues of Volume XXXI.

It is presently planned to furnish the cumulative index to our subscribers without any charge, this, of course, being subject to change as financial necessity dictates.

Change of Address

Every issue of the *Journal* results in several copies being returned due to erroneous addresses. The *Journal* is mailed by second-class mail, and consequently there is no provision for forwarding. If the issue is not claimed by the addressee, it is returned at *Journal* expense. It is respectfully urged that all members of the Bar promptly notify the *Journal* of any change of address. Our address is "Mississippi Law Journal, P. O. Box 146, University, Mississippi."

The Journal and the Mississippi Bar

The *Mississippi Law Journal* is the official publication of the Mississippi State Bar Association, and its primary purpose is to serve the Bar and its members. However, this relationship existing between the *Journal* and the Bar should not be characterized as a one-way affair, because of necessity it is a relationship out of which springs reciprocal duties and obligations. While it is true that the subsidy given the *Journal* by the Bar makes possible the *Journal's* physical existence, in order for the *Journal* to be classified as successful and to justify its existence, much more than mere pecuniary aid must be forthcoming. To adequately fulfill its purpose and obligations to the Bar, the *Journal* must receive support in the form of articles contributed for publication, suggestions and criticism from the Bar, suggestions as to topics that should be treated in leading articles, and an understanding on the part of the Bar of the problems encountered in the printing of a professional publication such as the *Journal*.

The financial ability to publish is of little signififcance where there is an absence of suitable material to print. We, therefore, would like to extend our sincere appreciation to our contributors and respectfully urge the members of the Bar to write and submit for consideration material for future publication in the *Journal*.

EXHIBIT "A" TO THE LAW JOURNAL REPORT

FINANCIAL REPORT OF THE MISSISSIPPI LAW JOURNAL
May 14, 1958—May 31, 1959

Receipts

Balance Remaining 1957-1958 Bar Appropriation	$00,000.00
Balance in Bank, May 14, 1958	2,799.51
Appropriation, Mississippi State Bar	4,750.00
Sale of Subscriptions	492.00
Sale of Back Issues	493.50

Sale of Advertising		1,085.0
Law School Student Assessments		546.0
Sale of Index		8.0
Miscellaneous Income		78.0
TOTAL RECEIPTS		$10,252.1

Disbursements

Printing:		
August, 1958 Issue	$ 704.00	
Volume XXIX, No. 4	1,643.65	
Volume XXX, No. 1	1,312.60	
Volume XXX, No. 2	1,445.80	
Volume XXX, No. 3	1,593.00	
Total Printing		$ 6,699.05
Postage and Box Rent		203.34
Stationery and Office Supplies		189.40
Telephone Expense		247.84
Addressograph Expense — Mailing List		167.61
Page in Yearbook		50.00
Bar Convention Expense		81.19
Law Journal Certificates		6.62
Miscelleaueous Expense		65.80
TOTAL DISBURSEMENTS		$ 7,710.85
Cash on Hand, June 1, 1959		2,541.25
		$10,252.10

EXHIBIT "B" TO THE LAW JOURNAL REPORT
PROPOSED BUDGET FOR THE MISSISSIPPI LAW JOURNAL

Receipts

Balance in bank, June 1, 1959		$ 2,541.25
Appropriations, Mississippi State Bar		5,000.00
Sale of Subscriptions		500.00
Sale of Back Issues		350.00
Sale of Advertising		1,000.00
Sale of Index		10.00
Law Student Assessments		550.00
Miscellaneous Income		75.00
TOTAL RECEIPTS		$10,026.25

Disbursements

Printing:		
August, 1959, Special Issue	$ 900.00	
Volume XXX, No. 4	1,600.00	
Volume XXXI, No. 1	1,550.00	
Volume XXXI, No. 2	1,550.00	
Volume XXXI, No. 3	1,550.00	
Total Printing		$ 7,150.00

Postage and Box Rent	200.00
Stationery and Office Supplies	150.00
Telephone Expense	200.00
Addressograph Expense — Mailing List	150.00
Page in Yearbook	50.00
Law Journal Certificates	10.00
Miscellaneous Expense	75.00
Printing of Cumulative Index, Volumes XXI-XXX	1,500.00
TOTAL DISBURSEMENTS	$ 9,485.00
Balance in Bank, May 31, 1960 (Estimated)	541.25
	$10,026.25

REPORT OF THE PROCEDURAL REFORM COMMITTEE

The Procedural Reform Committee held one meeting during the year.

It is unanimously recommended that Section 1483.5, Code of 1942, recompiled, which is commonly referred to as the Counterclaim Statute, be repealed.

Because there seems to be diversity of opinion among the several judges of the state as to the meaning of Section 1525, it should be clarified so as to allow the plaintiff and the defendant or defendants four challenges each and no more. It is the opinion of the committee that the statute already says this, but that it should be amended so as to make it clear and at the same time incapable of being misunderstood.

In some of the counties of the state, court still convenes twice and in some instances only once a year. Even in those areas where courts are busy and more frequently held a large portion of the time of the court is sometimes consumed in the settlement of pleadings. The statute requires an answer within thirty days after service of process on a defendant, nevertheless, in many counties outmoded forms of process are still used whereby defendants are commanded to appeal and plead on the first day on the next succeeding term of the court. In the interest of uniformity and a more rapid dispatch of business it is recommended that a uniform process issue in all cases returnable thirty days from the date of service on the defendant and containing an admonition to the effect that if a responsive pleading is not filed within that time judgment by default for the amount sued for will be taken against him. To this end, this committee recommends that judges be given the power to hear, determine, and settle pleadings, enter judgments by default, and award writs of inquiry to be subsequently submitted to juries, in vacation, in the county in which the action is pending, or by agreement of counsel in any other county in the district.

It was brought to the attention of the committee from many sources that needy persons having legitimate claims arising under the provisions of the Workmen's Compensation Statute are being subjected to unseemly delays in the administrative process of getting their cases heard and determined by the Workmens' Compensation Commission. It is recommended that an absolute time limit be written into the statute within which this commission must hear and finally determine a claim once it is filed.

REPORT OF THE RESOLUTIONS COMMITTEE

I

WHEREAS the Honorable Breed O. Mounger, retiring president of the Mississippi State Bar Association, has of his wealth of experience and ability, as both a lawyer and statesman, contributed very generously toward the raising of the standards of this Association, and enlightening the citizenry as to the proper role of the lawyer in our political, civic and economic growth and development, and

WHEREAS under his leadership and guidance, with help of his able committees and the Junior Bar Section, this Association has enjoyed remarkable progress, and

WHEREAS we liken him as a person of such physical and mental magnitude as to cast him in a position threefold,to-wit: That of an excellent head master of a school, that of a splendid public relations promoter, and that of a superior salesman,

NOW, THEREFORE, LET IT BE RESOLVED by the Mississippi State Bar Association at this its 1959 convention that we extend to the Honorable Breed O. Mounger our sincere appreciation and devotion for his unstinting and outstanding services to this Association during the past year.

II

WHEREAS, the Mississippi State Bar Association had the unusual privilege of hearing two of its distinguished statesmen speak yesterday, the Honorable James O. Eastland, Senior Senator of Mississippi, and the Honorable Jamie L. Whitten, United States Congressman from the Second Congressional District, and

WHEREAS, Senator Eastland and Congressman Whitten have impressed us with the problems that face our state, the South, and our country and have pointed the way that these problems may be solved, and

WHEREAS, the scholarly messages of these distinguished sons of Mississippi received the universal acclaim of all present and we are proud of the great work being done by them in Congress, and

WHEREAS we commend them for their accomplishments and services to the people of our great state and by these resolutions thank them and urge them to carry on the fight for the preservation of Constitutional government and our traditional Southern way of life,

NOW, THEREFORE, BE IT RESOLVED, by the Mississippi State Bar Association, in convention at Biloxi, Mississippi, this the 13th day of June, 1959, that a copy of the speeches of these distinguished gentlemen and a copy of these resolutions be delivered to the press and that we request that a copy thereof be placed in the Congressional Record and that a copy thereof be printed in the Mississippi Law Journal as a permanent record of the convention.

III

WHEREAS, Honorable Alfred S. Julien delivered a very able and instructive address to the Mississippi State Bar Association on the timely and important subject of products liability, based upon extensive research,

NOW, THEREFORE, BE IT RESOLVED by the Mississippi State Bar Association that we express our sincere appreciation and thanks to Mr. Julien for his most excellent address.

IV

WHEREAS, Governor Orval Faubus has demonstrated unusual courage and devotion to duty, in his efforts to protect the rights of the people of Arkansas, and consequently the rights of all people of our nation, and

WHEREAS, we are now faced with a great crisis, and the liberties and rights of the States are in grave danger of being forever lost, and

WHEREAS, Governor Faubus has delivered a very able address to this convention.

NOW, THEREFORE, LET IT BE RESOLVED that we commend Governor Faubus on his courageous efforts to protect and preserve our constitutional form of government and our Southern way of life and express our appreciation for his inspirational, factual and eye-opening address.

V

WHEREAS, this Association, at its 1958 convention, did by resolution pay to Mrs. Alice Nevels, our courteous, capable, and beloved secretary, a very high and well-deserved compliment, and

WHEREAS she continues her services as our secretary, and continues to render us unexcelled and indispensable services, without which this Association would in no wise be able to show a record of such magnificent progress,

NOW, THEREFORE, LET IT BE RESOLVED that this Convention express again its sincere thanks and appreciation and acknowledges its indebtedness to Mrs. Nevels for her untiring, courteous, loyal and devoted services to this Association, and go on record as stating that we again heartily approve and endorse every word of the beautiful tribute that was paid to her in said resolution of 1958.

VI

WHEREAS, for the past several years the same person with smiling and friendly face has greeted us, with pen in hand, from the speaker's stand, and efficiently recorded for us the proceedings of our conventions, never departing from her post of duty, and never asking for a short recess, and

WHEREAS, this same person, at the conclusion of each day's program, has speedily disappeared from view, only to continue her labor in transcribing and typing her notes, often through the night and until the break of dawn, and has reappeared on time at her station to begin another day of work, and

WHEREAS, this same person whose hands move gracefully and speedily across the pages of her notebook has become a vibrant and integral part of our conventions, and we have come to know and love her and think of her as our very own, and

WHEREAS, this person, the lady with the majestic smile and the magnetic touch is none other than Mrs. Alice McIntosh, the official court reporter of the Tenth Circuit Court District of Mississippi, and

WHEREAS, Mrs. McIntosh's able assistant during the present convention is Mrs. Eschol Helveston, the official court reporter of the Second Chancery Court District of Mississippi,

NOW, THEREFORE, BE IT RESOLVED by this convention that we extend to Alice McIntosh our sincere and deep appreciation for her continuous, loyal and efficient services to us, and pray her pardon for having been remiss in saying "thank you" in this manner prior to the 1959 convention.

AND BE IT FURTHER RESOLVED that we express thanks and appreciation to Mrs. Helveston for her courteous and efficient services during this convention.

VII

WHEREAS, we would have convened in chaos but for the "on the job" services of the "Indispensable Four", the ladies at the registration table—the registration clerks who gave us our programs, our tickets, "tagged" us, directed us, and in some instances told us our own names, and

WHEREAS, these ladies have rendered efficient and courteous services to us and have made a great contribution toward the success of the 1959 convention of the Mississippi State Bar,

NOW, THEREFORE, BE IT RESOLVED that we here and now recognize and express our deep appreciation to the "Indispensable Four", who are: Mrs. Lynel Echols, Mrs. L. C. Gooch, Miss Margaret Gooch (Mother and daughter) and Mrs. David L. Sadler.

VIII

WHEREAS, for many years Kenneth Toler has so ably, conscientiously and fairly reported the political, legislative, executive and judicial news of the State of Mississippi through the Commercial Appeal of Memphis, Tennessee, and

WHEREAS, through his reportings he has brought recognition, respect, honor and dignity to our state, and has proved himself one of Mississippi's top-flight citizens, and

WHEREAS, he has proved himself a sincere and understanding friend of and asset to the legal profession of our state,

NOW, THEREFORE, BE IT RESOLVED that the Mississippi State Bar, in convention assembled at Biloxi, Mississippi, on this the 13th day of June, 1959, hereby go on record as extending to Kenneth Toler our deep appreciation for his said services to our state and our legal profession, and that we extend to him the invitation to become an honorary member of our Association and bestow upon him such honorary membership.

IX

WHEREAS, the program committee of the Mississippi State Bar Association has provided a most excellent program, including able addresses by Senator Eastland, Congressman Whitten, Governor Faubus and Honorable Alfred S. Julien, and has arranged a unique and entertaining program at our banquet, including the address of the anonymous humorist, alias Judge S. J. Sparks.

NOW, THEREFORE, BE IT RESOLVED that we express our appreciation to each member of the program committee, to each person on the program and all persons responsible for our excellent program—at this convention.

X

WHEREAS, the local arrangements committee was composed of: Honorable David Cottrell, Jr., Honorable R. W. Thompson, Jr., Honorable Daniel D. Guice, Honorable Victor B. Pringle, Honorable Eaton A. Lang, Jr., and Honorable Lyle M. Page, and the local committee for ladies' entertainment was composed of Mrs. Arnaud O. Lopez, Mrs. Victor Pringle, Mrs. Howard A. McDonnell, Mrs. David Cottrell, Jr., Mrs. William Hewes, Mrs. Bidwell Adam, who have unreservedly and graciously provided for our entertainment at this convention, and have shown themselves a genial host and made each of us feel as a welcome and honored guest,

NOW, THEREFORE, BE IT RESOLVED that we extend to each member of these committees our sincere thanks and appreciation for the well-planned program of entertainment for us and our assurance that we have greatly enjoyed every phase of it.

XI

WHEREAS, the convention of the Mississippi State Bar has so often been held at Jimmie Love's Buena Vista Hotel on the glamorous, glittering and gilded Gulf Coast, and

WHEREAS, we have occasionally erred and strayed elsewhere to hold a convention, only to return "home" the following year, due to nostalgia for the enchanting and bewitching aura and vista of the locale, and especially for the hearty and "welcome home" greetings of Jimmie Love and the entire personnel of his hotel, including the long line of syncopating waiters who bring the trays of food in symmetrical balance to our banquet tables, and

WHEREAS, it may be possible that we shall err and stray again for our convention of 1960.

NOW, THEREFORE, BE IT RESOLVED as follows:

1. That we express to Jimmie Love and all who comprise his fine institution our appreciation for "a good time had by all" at this our 1959 convention.

2. That if we err and stray for our convention of 1960, he welcome us "home" for the convention of 1961.

REPORT OF THE SUPREME COURT BUILDING COMMITTEE

In 1956 the Conference of Local Bar Associations initiated this idea of a new building to house our Supreme Court, the attorney general's office, the supreme court clerk, and our own Mississippi State Bar offices. So in 1957 the Conference presented to this body, the Mississippi State Bar, at the convention in Jackson, the idea which was unanimously approved. On the approval of that resolution, President Henley appointed a rather large committee of which I was chairman. The committee was divided into three sub-committees, one headed by Mr. Dixon Pyles to bring to us the real need for such a building, and we have found that the office now used as a private office by the attorney general was originally planned for the lieutenant governor. His assistants are officed in committee rooms which were intended for the use of the Mississippi Senate. The Supreme Court has been enlarged twice from three members to six members to nine members, and they can't have their conferences at all on one floor. They have to go up and down the steps. So the situation is bad as far as the Supreme Court members are concerned.

They are not complaining. This idea did not come from them, but we have found a real need from their standpoint. Our Supreme Court records are housed in a basement. They are going to be lost to us—some of them very valuable—because the business of the Supreme Court clerk's office and the Supreme Court itself has expanded to the extent that something will have to be done about it.

It is a shame the tremendous work that is being done by Mrs. Nevels' office. They have just got a little cubby-hole in which to work. So I can expand on that, about the need of it, Mr. Sidney Carlton was appointed chairman of a sub-committee to confer with an architect as to the kind of building we would have. We have come up with a building which will have six floors. The Supreme Court will be on one floor, the clerk's office on the other, the library on the other—I didn't mention that—our own office on the top floor, I believe it is, and then the other floor will be for the attorney general. Mr. Carlton labored very long on this and did an excellent job on the kind of building needed.

Now the only thing left was a sub-committee to draft a bill. The Attorney General is chairman of that committee. We had conferences on whether that bill should be introduced at the last session of the Legislature. Things came up that we didn't think it would be the expedient time to do it, but we believe that the coming session should deal with this problem before it is too late or before additional time is taken.

Now what can you do? You have already passed on it. You approved it in 1957, and now it is up to all of us to get behind it if we are sold on this proposition, on this project. So I hope that during this summer campaign that you will talk to the legislators and the ones that are elected so that they will be thoroughly familiar with the idea when they come to Jackson and when the bill is introduced they will work for it and get it passed.

REPORT OF THE COMMITTEE ON TAXATION

Your committee on taxation now consists of three sub-committees as follows: Subcommittee "A", Special Liaison Tax Committee; Subcommittee "B", National Conference of Lawyers and Certified Public Accountants; Subcommittee "C", Special Programs.

Subcommittee "A" had been recognized by the Board of Commissioners in 1956. Provision had been made for this committee to be represented at the annual conference at Atlanta, Georgia. The Board of Commissioners approved a membership fee which was required and also provided for travel expense of a delegate to attend the annual convention at Atlanta, Georgia, as a representative from the Mississippi State Bar Association. The charter of the above committee was accepted by the Board of Commissioners; however, only two members of the subcommittee had been appointed and each had been appointed to serve a one year term. In order to comply with provisions set out in the charter and by-laws of the Special Liaison Tax Committee, three members were appointed to serve during the past year and they, also in accordance with procedures, were appointed for periods of three, two and one year terms, respectively. Tom Leslie Darden, New Albany, Mississippi, has served as chairman of this subcommittee. Submitted with this report is a copy of the minutes of the annual meeting held at Atlanta, Georgia, during the past year. Recommendations have been made by the members of the Bar through this committee and your chairman of the overall Committee on Taxation has conferred with representatives of Internal Revenue Service at the state, district and regional level for the purpose of effecting better procedures and improving public relation between representatives of Internal Revenue Service and members of the Mississippi Bar Association. It is recommended that the expense allowance for travel to Atlanta be increased to provide for two delegates to attend the annual convention.

Subcommittee "B", National Conference of Lawyers and Certified Public Accountants, was newly organized during the past year as a result of a resolution adopted by the Mississippi Bar Association at its 1958 convention. This committee consists of six members who serve three, two and one year terms, respectively. The purpose of this subcommittee is to arrive at policy and to delineate lines of practice between members of the legal profession and members of the accounting profession similar to those already adopted by the National Conference of Lawyers and Certified Public Accountants and the American Bar Association modified to meet the policies of the Mississippi Bar Association acting through this subcommittee. John T. Green, Natchez, Mississippi, chairman of this sub-committee, has done considerable research especially in connection with cases tried in the State of Kentucky wherein it was alleged accountants had encroached into the practice of law and had been the object of litigation. In Mr. Green's research he has indicated a number of instances wherein the legal profession has found it necessary to find its remedy in the courts of law as to violations and encroachment of practice by accountants and others especially in the field of taxation. Mr. Green has deferred holding a joint meeting with the members of this committee and with a six man group which has been organized to represent the Mississippi Society of Certified Public Accountants until such time as a meeting of his full subcommittee can be held and final policy matters determined as to the position this subcommittee will take as representatives of the Mississippi Bar Association. It is recommended that the Board of Commissioners give consideration to providing a fund for travel for a delegate to attend such meeting or meetings as may appear helpful in carrying out the duties of this subcommittee.

Subcommittee "C" is a newly organized subcommittee on Special Programs. Lee R. Spence, Jackson, Mississippi, has served as subcommittee chairman during the past year. This subcommittee was newly organized in recognition of its usefulness in giving technical information to members of the Mississippi Bar Association in its various professional gatherings. Speakers have been available for county, district and statewide meetings. This subcommittee consists of thirteen members who represent specialization within the specialized field of taxation and they have been available upon call for giving talks on technical subjects to groups as suggested above. In addition, representatives of the committee have also appeared before other business and professional groups and have given programs on technical tax matters which have, no doubt, resulted in creating good public relations and adding dignity and prestige to the field of tax practice through the efforts of the Mississippi State Bar. It is recommended that this subcommittee be continued and that its status in the committee on taxation be made known to those responsible for planning various programs, seminars, tax institutes, etc., as soon as possible after the conclusion of this convention in order that plans may be made to have representatives of the Special Program Subcommittee available and to be able to appear when requested.

COMMITTEE REPORTS – JUNIOR BAR SECTION

REPORT OF THE ACTIVITIES COMMITTEE

Over the past several years it has become increasingly evident that the newly admitted lawyers know little, if anything, of the function, purpose, or workings of the Junior Bar Section of the Mississippi State Bar Association. On several occasions it was apparent that the new attorney felt that the Junior Bar was a name only or if more, then a private organization, with membership by invitation and controlled by a select few; or perhaps an organization comprised of organized junior bars from the larger cities of the State.

Your Executive Committee and President were convinced that a more active participation could be effected by informing the newly admitted attorneys of the aims, functions and ambitions of the Junior Bar Section, and that a stronger, more ambitious and active membership would result in an immediate strengthening of the Junior Bar and ultimately a strengthening of the entire Bar, and, therefore, created a new committee to be known as the Activities Committee.

The Activities Committee faced with the immediate task of attempting to contact all new attorneys before the forthcoming convention wrote a congratulatory informative letter to 49 newly admitted attorneys in 4 groups; the July 1958 Successful Applicants of the Bar Examination; the August 1958 University Graduates; the January 1959 University Graduates; and the Successful Applicants of the February 1959 Bar Examination.

Because of the time element, only the Spring 1959 University Seniors could be personally contacted as a group; this was done by a member of this committee when they were admitted to the bar by Chancellor William Anderson on May 27th at Oxford. Although previously contacted by letter, your committee felt that, if possible, each new attorney should be personally contacted and accordingly made arrangements for such contact to be made by local attorneys in their respective home towns. Many of you here today assisted this committee in this undertaking.

Your committee reports that 49 separate letters were written and of the 64 newly admitted attorneys since this time last year, we have 44 confirmed follow-up personal contacts.

Your committee would make the following recommendations and suggestions:

1. That the Activities Committee be made a standing committee.
2. That at least one member of the committee be appointed from Oxford and one member from Jackson.
3. That a brief welcoming be made by a member of the committee at each graduation from Ole Miss and at each Bar Examination in Jackson.
4. That a follow-up personal contact be made each Spring along similar lines employed by your present committee.
5. That future budgets of the Junior Bar be adjusted to provide at least a part of the expense involved.

REPORT OF ACTIVITIES OF THE JUNIOR BAR CONFERENCE OF AMERICAN BAR

Honorable K. Hayes Callicutt represented the Junior Bar Section of the Mississippi State Bar at the annual meeting of the Junior Bar Conference of the ABA.

During the past year the Junior Bar Conference sponsored a membership drive which proved to be a great success. When all the new memberships were totalled the State of Mississippi ranked ninth in attaining their membership goal as compared with the other states. The Junior Bar Section may be justly proud of this record.

Under the leadership of Honorable Kirk McAlpin, the Junior Bar Conference has become interested in a program of continuing legal education. The Junior Bar Section of the State of Mississippi was asked to appear on the program to explain the functions of our "Young Lawyer's Seminar." The presentation was favorably received and it seems that the other Junior Bar Associations are actually looking to Mississippi and Florida for ideas in this area. A committee was appointed during the meeting in Los Angeles to be known as the Practical Legal Education Committee.

The Junior Bar Conference is also helping the ABA sponsor Law Day—USA, in answer to the Communist May Day.

Another program sponsored by the Junior Bar Conference concerns the traffic courts. One program is entitled, "Visit the traffic courts as a visitor and not as a violator." In Mississippi we have appointed a committee to actually put on a traffic court seminar.

The Junior Bar is also working for the passage of a bill which will give professional people retirement benefits. The bill would allow people engaged in a profession to set aside a certain amount of money for retirement.

Another bill the Junior Bar is sponsoring is a bill to provide adequate compensation for lawyers who defend indigent persons in federal court. This bill would provide that an adequate fee be paid by the federal government.

The Junior Bar section of the Mississippi State Bar has increased its activities with the Junior Bar Conference of the ABA. We have received much favorable publicity from our endeavors. It is felt that we should continue to work closely with the Junior Bar Conference and do our best to participate in their programs.

REPORT OF THE LEGAL AID COMMITTEE

The Legal Aid Society in Hinds County has been progressing every year, as is shown by the number of cases that have been handled throughout the period of the Society's existance. From 1952 through 1954 a total of 240 cases were handled by the Legal Aid Society. In 1956 a total of 174 cases were handled by the Society, in 1957 there was an increase to 264 cases, and in 1958 there was an increase to 291 cases.

Commencing with the year 1959, we will function under a new system whereby all cases will be handled to a conclusion. Therefore, a legal aid attorney will be in the office much more frequently than has been the case in the past. At present we are handling all the cases to completion, filing the necessary pleadings and trying the cases.

The necessary funds to maintain a full time office are not available, but if the work load increases as is anticipated a full time legal aid attorney will be necessary in Hinds County.

It is the recommendation of the committee that the Bar Association in conjunction with the Junior Bar Section initiate a program to establish legal aid organizations in the various counties throughout the state, in order that this service will be available to many more indigent persons who would otherwise be unable to have their rights enforced in court.

REPORT ON THIRTEENTH ANNUAL MISSISSIPPI LAW INSTITUTE

The thirteenth annual Mississippi Law Institute was held on December 5th and 6th, 1958, at the King Edward Hotel in Jackson, Mississippi. As in the past, the Institute was co-sponsored by the Jackson Junior Bar and the University of Mississippi School of Law. Serving as Chairman for the Institute was Honorable Russell D. Moore, III, of Jackson.

The Institute was highly successful in that approximately 250 members of the Bar were in attendance. Also attending were approximately 50 students from the University of Mississippi School of Law.

The program for the Institute was presented by the Honorable Melvin M. Belli and his associates. Mr. Belli is one of the nation's most outstanding trial lawyers, lecturers and legal writers. Mr. Belli's program included such topics as Trial and Tort Trends, Trial Procedure and Tactics, Medico Legal Problems and Effective Defense Procedures.

The Institute was extremely fortunate in obtaining Honorable Erle Stanley Gardner as the banquet speaker. Mr. Gardner gave a most enlightening talk pertaining to the legal profession, entitled "What is Ahead in the Law." The popularity of Mr. Gardner, better known as Perry Mason, was attested to by the fact that the attendance at the banquet was the largest in the history of the Institute.

Although the Institute was well attended, a loss of $142.43 was incurred due to the high program cost and the necessary incidental expenses. Since the Institute has, through tradition, become the mid-winter meeting of our State Bar, we encourage each member to attend the Institute and encourage attendance by other members. The committees of the Institute through the years have always attempted to bring to the Bar an educational as well as interesting program. The only way, however, the Institute can continue on a sound financial basis is by having the wholehearted support of the members of the Bar.

Plans are already in progress for the 1959 Institute. These plans are still tentative but envision a bold and ambitious program that will be quite different from any of the programs in the past. The Institute hopes to work out an arrangement, whereby the program will be presented by the Law-Science Academy.

FINANCIAL REPORT 1958 MISSISSIPPI LAW INSTITUTE

Deposits:	
Previous fund withdrawal	$ 300.00
Ticket sales	3,737.00
TOTAL	$4,037.00
Expenditures:	
Johnny's Restaurant	$ 27.93
King Edward Hotel	70.48
U. S. Post Office	150.40
Norman Nasif	319.29
John Countiss	174.00
Howell Printing	56.98
Office Supply	43.88
King Edward Hotel	1,399.06
Belli	1,500.00
Standard Mat	47.67
Johnny's Restaurant	19.35
Whitley Flowers	46.58
Jasper Ewing & Sons	23.81
TOTAL	$3,879.43
Recapitulation:	
Deposits	$4,037.00
Expenditures	3,879.43
BALANCE	$ 157.57

REPORT OF THE YOUNG LAWYERS' SEMINAR COMMITTEE

This committee, with the able assistance of Mr. K. Hayes Callicutt, Junior Bar President, conducted the First Annual Young Lawyers' Seminar on September 5-6, 1958, in the Student Union Building at Millsaps College, Jackson, Miss. Lectures with printed subject outlines and forms, were given by capable members of the Bar on eight subjects of the law, namely, "Mechanics of the Courts" by Mr. Curtis E. Coker, "Defense of Criminal Actions" by Mr. John A. Travis, Jr., "Wills and Estates" by Mr. Tom Leslie Darden, "Workmen's Compensation" by Mr. Russell D. Moore, III, "Negligence Actions" by Mr. Joshua M. Morse, III, "Accounts Collection" by Mr. Carl E. Guernsey, "Abstracts and Titles" by Mr. Harold Robert Barber, Jr., and "Domestic Relations" by Mr. Jay Gore.

Advance publicity was given to the Seminar in the form of letters, spoken announcements and newspaper articles. Brochures of excellent quality and attractiveness were sent to prospective enrolees. A sample brochure is appended to this report.

The Millsaps Student Union Building, being modern, spacious, well-appointed, air conditioned and convenient, was an excellent place to hold the Seminar. The Committee received very generous help and cooperation from the College.

The lectures, with outlines and forms, were well presented and received. Afterwards, questionnaires were sent to all the young lawyers who attended to determine their opinions of the Seminar. We will find their remarks, criticisms and suggestions helpful in planning and conducting subsequent seminars. The consensus is that the Seminar is very worthwhile and should be continued, improved and expanded.

The Seminar was limited to Spring law graduates and Summer successful bar examinees. Eleven such new lawyers attended the Seminar. The registration fee was $25.00 each. Our receipts totaled $275.00 and our expenditures totaled $425.00, for a net loss of $150.00. Money from the Junior Bar allotment from the Senior Bar was used for the Seminar.

Plans for an improved and expanded Second Annual Young Lawyers' Seminar at Millsaps College are now being laid. It will probably be held during the second half of August. We hope and modestly expect it to be a success and some improvement over the First Annual Seminar.

This committee is indebted to the attorneys who sacrificed their very valuable time to prepare outlines and forms and to present lectures. Also, we want to express our sincere appreciation to the State Bar Secretary, Mrs. Alice Nevels, and her competent staff for invaluable and most timely assistance. Our thanks, too, go to the administration, and particularly to Mr. J. W. Wood, Business Manager, of Millsaps College.

APPENDIX B

DIRECTORY

MISSISSIPPI STATE BAR

AUGUST, 1959

ABERDEEN

Richard B. Booth
Harrison Bldg.
D. W. Houston, Jr.
Watkins Bldg.
George W. Howell, Jr.
McDufffie Bldg.
Box 476
Robert D. Patterson
Box 136
Lyonel Thos. Senter, Jr.
301 W. Commerce St.
Johnny N. Tackett
Box 157
John S. Therrell
Box 424
William S. Turner
Box 386

ACKERMAN

Jack B. Carlisle
William Dewitt Coleman
James Dennis Dobbs
Box 155
Bennett E. Smith
Box 215

AMORY

John E. Johnson
907 - 10th Ave., N.
J. O. Prude, III
Box 124
Jack N. Thomas
Box 267
Fred P. Wright
Griffin Bldg.

ASHLAND

J. Marvin Crawford
Anthony T. Farese
Box 135
John B. Farese
Box 135
L. Hamer McKenzie

BALDWYN

Judge Allen Cox
W. H. Cox
Box 353
M. Paul Haynes

BATESVILLE

Dennis M. Baker
Charles Clifton Finch
Box 86
Hill Jarratt
D. R. Johnson
Box 288
Robert T. Riser
Arnold R. Smythe
Ralph O. White
Box 86

BAY ST. LOUIS

Jos. H. Bevenutti
300 Toulme St.
Evelyn Hunt Conner
Box 281
Sam Leroy Favre
Box 323
R. L. Genin
Genin Bldg.
Gerald C. Gex
Merchants Bank Bldg.
Lucien M. Gex
Merchan Bank & Trust
Co. Bldg.
Edward I. Jones
Box 15
Cornelius Joseph Ladner
Box 412
Ben Cameron Moore
330 Carroll
Walter J. Phillips
Merchants Bank & Trust
Co. Bldg.
Dan M. Russell, Jr.
153 Main St.

BAY SPRINGS

Wm. Harrison Alexander
Charles R. Mayfield, Jr.
Box 251
J. A. McFarland, Jr.
Robert H. McFarland
O. M. Oates
Box 25
Marvin O. Oates
Box 25
Roy L. Osborne
Route 1
J. L. Thompson
J. E. Ulmer, Jr.
Box 1

BEULAH

Dixon Dossett

BELMONT

L. P. Allen, Jr.

BELZONI

James T. Bridges
Box 322
V. B. Montgomery
Box 277
L. G. North
Irby Turner, Jr.
Hugh R. Varnado, Jr.
Box 277
Lucian R. Wadlington
Box 355
W. D. Womack, Jr.
W. D. Womack, Sr.

BILOXI

Lynden Bowring
941 E. Beach St.
F. G. Cody
406 Benachi
L. C. Corban, Jr.
Box 2
L. H. Doty
1730 W. Beach
Judge Leslie B. Grant
Circuit Court
Daniel D. Guice
First Bank of Biloxi Bldg.
Box 153
Jacob D. Guice
First Bk. of Biloxi Bldg.
Box 153
W. L. Guice
Box 153
Louis Hengen
215 Barq Bldg.
Clare Sekul Hornsby
Barq. Bldg.
Carroll B. Ishee
Box 646
Albert S. Johnston, Jr.
Box 214
Arnaud O. Lopez
202 Barq Bldg.
James S. Love
Hotel Buena Vista
Frederick J. Manning
Peoples Bank Bldg.
Box 92
Howard McDonald
Barq. Bldg.
Roy J. McGee
217 Porter Ave.
Walter L. Nixon, Jr.
Box 541
Lyle M. Page
Box 222

Charles K. Pringle
Box 23
Victor B. Pringle
Pringle Bldg.
Box 24
Jules A. Schwan
Box 272
John Sekul
203 Barq. Bldg.
Lawrence Semski
Box 552
E. C. Tonsmeire, Jr.
Peoples Bank Bldg.
H. Warren Tool, Jr.
Box 928
Edward G. Tremmel
1341 LaSalle St.
Walter J. Wadlington
Peoples Bank Bldg.
Box 2
Thomas L. Wallace
Box 552
Thomas J. Wiltz, Jr.
Peoples Bank Bldg.
Box 397
George E. Winkler
124 W. Pine Ave.
Pass Rd. Gardens

BOLTON

Albert M. Graham

BOONEVILLE

William H. Brewer
Clarence Chase
Schultz Bldg.
Thomas H. Comer
Box 24
F. W. Cunningham
James A. Cunningham, Sr.
J. E. Cunningham
Ellis W. Finch
Box 46
Donald Franks
James N. Godwin
Box 148
Judge Raymond T. Jarvis
Circuit Court
E. K. Windham

BRANDON

Joe Ragland Bullock
W. E. McIntyre
W. E. McIntyre, Jr.
John C. McLaurin
James Anthony Morrow, Jr.
J. C. Murray
Box 7
John C. Murray, Jr.
Box 7
J. David Williams
Box 263

BROOKHAVEN

Emmette P. Allen
Bane Drug Bldg.
John Moncrief Bee
510 S. Church St.
Judge Tom P. Brady
Drawer 548
Tullius Brady
Box 115
Chas. Emmette Brennan
Box 9
Michael L. Carr, Jr.
Box 786
Buell R. Carty
Perkins Bldg.
Box 677
A. A. Cohn
Panzica Bldg.
J. O. Day
Rt. 5, Box 41
James W. Elliott, Jr.
Storm Bldg.
Box 786
George H. Gulley, Jr.
Box 317
H. W. Hobbs
Panzica Bldg.
Box 356
Henry W. Hobbs, Jr.
Box 356
R. L. Jones
State Bk. & Tr. Co. Bldg.
Robert E. Jones
Drawer 831
James F. Noble, Jr.
Box 4
J. F. Noble, Sr.
Box 4
Donald B. Patterson
Miss. Power & Light Co. Building
R. Pearce Phillips
Storm Bldg.
Box 786
Thomas Owen Roberts
Brady Bldg.
Box 677
R. E. Stratton, III
State Bk. & Tr. Co. Bldg.
Terry S. Swalm
Swalm Bldg.
Hugh V. Wall
State Bk. & Tr. Co. Bldg.
J. Meridith Wood
Johnson Bldg.
Box 1034

BRUCE

Jesse Lee Yancy, Jr.
Box 62

CALHOUN CITY

Wm. Walter Brown
Box 146

W. J. Evans
Paul M. Moore

CAMDEN

Edgar Lee Walker

CANTON

James Paul Arbuthnot
James A. Butchart
136 N. Liberty St.
James M. Cain
Wells Bldg.
S. Robert Cain, Jr.
William Sterling Cain
George Milton Case
128 N. Liberty St.
Nelson R. Cauthen
Hermon Dean
Henry Nolen Fancher
Box 281
Joe R. Fancher, Jr.
Box 281
J. M. Greaves
Box 128
Clinton G. Herring
Box 344
George B. Herring
First Natl. Bank Bldg.
Box 344
Josephine Hood
D. C. McCool
Box 172
Percy F. Parker
Levy Bldg.
Robert H. Powell
Box 245
Robert H. Powell, Jr.
Box 245
Tip Ray
L. G. Spivey
J. Collins Wohner

CARROLLTON

Maurice R. Black

CARTHAGE

Joe Paschal Barnett
Judge O. H. Barnett, Jr.
Circuit Court
Tom J. Barnett
Harold W. Davidson
J. O. Hollis
J. H. Sasser
Drawer 31
J. E. Smith
Box 387
A. M. Warwick
Alvin Roy Wright, Jr.
Box 424

CARRIERE

M. G. Blackwell
Box 98

CHARLESTON

James A. Blount
J. H. Caldwell, Jr.
Drawer 112
George P. Cossar
Albert D. Whitten
Box 145

CLARKSDALE

Wm. R. Bradley
Stevens Bldg.
E. Cage Brewer, Jr.
Box 306
Ed C. Brewer
Box 306
V. J. Brocato
Box 509
Rodney Brooks
Coahoma Co. Bk. Bldg.
Martin D. Cook
202 Coahoma Co. Bk. Bldg.
John W. Crisler
319-20 McWilliams Bldg.
Chester Harris Curtis
Box 368
Louis A. Demos
111 LeFlore St.
Jack F. Dunbar
McWilliams Bldg.
John H. Hector, Jr.
Box 605
Pascal D. Holcomb
Box 368
Joe W. Hopkins
Box 382
R. H. Kirby
Stovall Lowrey
Coahoma Co. Bank Bldg.
Semmes Luckett
121 Yazoo Ave.
William O. Luckett
Box 306
Sidney Allen May
1519 Linden Place
Fletcher F. Maynard
Drawer 480
G. F. Maynard, Jr.
Drawer 480
William H. Maynard
Drawer 480
Leighton S. Miller
Box 715
T. H. Pearson
330 Oakhurst
Leon L. Porter, Jr.
Box 431
Joseph Lesley Prude
Box 774
J. Lake Roberson
121 Yazoo Ave.
Shed Hill Roberson
121 Yazoo Ave.
Harvey T. Ross
Box 339
Tom T. Ross
Box 339
Lester M. Sack
Box 626
John Charles Senour
426 W. 2nd St.
Charles L. Sullivan
Box 371
E. F. Whittington
Box 181
Howard G. Woodward
Box 876
Judge E. M. Yerger
County Court

CLEVELAND

W. B. Alexander
112 N. Pearman St.
Wm. B. Alexander, Jr.
112 N. Pearman St.
William H. Bizzell
Drawer 1031
Hugh F. Causey
Ancil L. Cox, Jr.
116 S. Court St.
C. H. Crump
Joseph C. Feduccia
112 N. Pearman Ave.
Judge Ed H. Green
Circuit Court
Ellis Griffith
Owen Bldg.
Box 552
John L. Hatcher
Joseph N. Howorth
515 S. Victoria Ave.
Lucy S. Howorth
515 S. Victoria Ave.
Robert Milton Hytken
Box 367
Judge Robert E. Jackson
Chancellor
Charles C. Jacobs, Jr.
W. D. Jones
108 N. Pearman
Alfred A. Levingston
Drawer 1031
Ben Ferrell Mitchel
Somerville Bldg.
Box 552
Dana C. Moore, Jr.
116 S. Court
William E. O'Hare
Box 630
Holcomb P. Pittman
209 N. Christman
Harvey Blanton Ray
Alexander, Feduccia & Alexander
William A. Schmitt
112 N. Pearman Ave.
Albert Benjamin Smith, Jr.
Owen Bldg.
John T. Smith
Box 630
Abe D. Somerville
Box 387
A. B. Sparkman
Carmon E. Valentine
127 S. Court St.
John White Valentine
127 S. Court St.
Frank O. Wynne, Jr.
Owen Bldg.

CLINTON

Corwin G. Muse, Jr.
Clinton Savings & Loan Building
Royce L. White
Box 534
R. P. White, Jr.
805 E. Leake
Gladstone E. Williams
Box 176

COFFEEVILLE

J. P. Stone
W. I. Stone

COLLINS

William W. Allred
Box 263
E. L. Dent
W. W. Dent
J. D. Kervin, Jr.
John K. Keyes
Hugh McIntosh
Cecil A. Rogers
Bonnie Smith

COLUMBIA

Vernon H. Broom
203 Newsom Bldg.
Walter Earl Bullock
225 E. 2nd St.
Bernard Callender
310-12 Newsom Bldg.
James Seaborn Dale, Jr.
Watts Bldg.
Box 603
R. H. Dale
Box 623
Judge Sebe Dale
Circuit Court
Maurice Dantin
310 Newsom Bldg.
James R. Davis
Box 222
Ernest R. Duff
216 Newsom Bldg.
Roy J. Goss
210-11 Newsom Bldg.
Toxey Hall
310-12 Newsom Bldg.
Kelly J. Hammond
Box 569

Michael H. Lawless
  Newsom Bldg.
Henry Mounger
  Suite 216, Newsom Bldg.
Henry E. Pope
  Box 569
Ben Mounger Rawls
  Citizens Bank Bldg.
H. C. Rawls
  Citizens Bank Bldg.
H. Phillip Singley
  309 Newsom Bldg.

COLUMBUS

Wm. Ellis Bearden, Jr.
  518½ Second Ave., N.
William G. Burgin, Jr.
  516 - 2nd Ave., N.
Richard Henderson Carlisle
  2nd Ave., N.
H. T. Carter
  522 - 2nd Ave., N.
Charles L. Garnett
  Box 1001
Hunter M. Gholson
  Burgin & Gholson
  516 N. 2nd Ave.
Dewitt T. Hicks, Jr.
  268 McHall Drive
John H. Holloman
  512-2nd Ave., N.
Willis H. Jolly
  514 - 2nd Ave., N.
T. W. Lewis, Jr.
  Box 152
George L. Lucas
  519 North 2nd Ave.
John Paul Moore
  521 - 2nd Ave., N.
Ben L. Owen
  Box 1001
J. O. Sams
  514 - 2nd Ave., N.
Joe O. Sams, Jr.
  Box 304
Geo. W. Schweizer, Jr.
  Box 166
John F. S. Sims
  1124 N. 11th St.
W. L. Sims
  1124 N. 11th St.
Douglas Clyde Stone
  Commercial Dispatch
  Bldg., Box 166
R. C. Stovall
  Box 591
W. J. Threadgill
  512 - 2nd Ave., N.
Henry K. Van Every
  Box 981
Robin Weaver
  Box 1003
David J. Whitaker, Jr.
  218 N. 5th St.
  Box 101

COMO

Henry N. Shaheen

CORINTH

W. C. Adams
Hugh A. Hopper
  Liddon-Chambers Bldg.
Frank K. Hughes
  715 Foote St.
  Box 60
Joe B. Mitchell
  509 Waldron St.
James E. Price, Jr.
  Box 866
H. M. Ray
  Box 907
William L. Sharp
  Box 844
Robert L. Shirley
  1403 Magnolia Rd.
Orma R. Smith
  Nat'l Bk. of Commerce Bg.
Orma R. Smith, Jr.
  Box 488
Carey Stovall
  201 Chambers-Liddon
  Bldg.
N. S. Sweat
  Box 227
N. S. Sweat, Jr.
  Box 227
W. C. Sweat
  Nat'l. Bank Bldg.
W. C. Sweat, Jr.
  Nat'l. Bank Bldg.
B. F. Worsham
  Box 146

CRYSTAL SPRINGS

Willie M. Broome
  Broome Bldg.
Laurin W. Ware
  Box 246
Donald Weed
  Box 30

DECATUR

R. H. Day
James B. Everett
Benton R. Gordon
Marcus D. Gordon
Wm. H. Johnson, Jr.
  Box 55

DEKALB

J. H. Daws
J. T. McCully
  Box 1456
Helen J. McDade
  Box 1562
Louie P. Spinks
  Box 1476

DREW

Frank Owen Crosthwait, Jr.
O. M. Marsalis
Pascal J. Townsend, Jr.
  Merchants & Planters Bk.
  Bldg.

DUNCAN

Glover A. Russell
  Box 366

DURANT

Carl F. Drake
Calvin R. King
  Box 91
James A. White
  101 E. Madison

EDWARDS

John M. Kendrick

EGYPT

David B. King

ELLISVILLE

W. D. Carmichael
Glender Dennis
Cecil G. Johnson
  Box 403
L. K. Saul
  Courthouse

ETHEL

Marvin Burchfield
  Route 1
William Lloyd Rone
  Box 100

EUPORA

J. E. Eudy
  Box 267
Allen Gardner
W. D. Gary
  Box 132
Walter B. Meek
Judge R. P. Sugg
  Chancellor

FAYETTE

Harry L. Corban
R. L. Corban, Jr.
Carroll J. McLaurin
James M. Walker
  Box 36

FOREST

T. Marx Huff
  Drawer 179
William A. Huff
  Drawer 179

Osborn Guyton Idom
Box 93
James Walter Lee
Box 115
Roy Noble Lee
Masonic Bldg.
Howard B. McCrory, Jr.
Box 46
F. F. Mize
Palace Theatre Bldg.
R. L. Nichols
Drawer 179
Roby L. Stegall
209 E. 1st St.
Wm. Carl Thompson
Box 203
O. B. Triplett, Jr.
Box 247

FOXWORTH

Mrs. U. P. Fornea
Box 314

FULTON

J. H. Brown
William Herman Camp
A. T. Cleveland
W. L. Elledge
Percy A. Martin Jr.
Box 91
Malcolm T. Yawn

GATTMAN

Ralph Pogue

GLOSTER

Fred A. Anderson, Jr.
Box 218
Walker Jean Carney, Jr.
J. T. Lowrey
Amite Co. Bank Bldg.
Joe Upton

GREENVILLE

Nathan P. Adams, Jr.
411 Weinberg Bldg.
Joseph Watson Biggers
745 Hwy. 82 So.
Edward J. Bogen
Weinberg Bldg.
Roy D. Campbell
Dr. 366
Geo. L. Cottingham, Jr.
Greenville Buick-Pontiac Co.
Box 655
Ralph D. Davison
Box 459
Fountain D. Dawson
Leyser Bldg.
Box 2951
Anse Dees
Box 168
Fred C. DeLong, Jr.
Box 663
Albert Dickens, Jr.
Box 127
Howard Dyer, Jr.
326 Weinberg Bldg.
Holland O. Felts
Box 298
Jerome S. Hafter
429 Weinberg Bldg.
Emmett Harty
205-08 Weinberg Bldg.
William C. Keady
Box 663
Ernest Kellner
May Bldg.
Ernest Kellner, Jr.
May Bldg.
Raymond V. Kimble, Jr.
205-08 Weinberg Bldg.
J. A. Lake, Jr.
429-32 Weinberg Bldg.
Robert Hart Lake, Jr.
124 S. Poplar St.
Robert T. Love
Drawer 650
W. M. McGough
411 Weinberg Bldg.
W. L. McIlwain
Box 558
Philip Mansour
Woolworth Bldg.
Box 591
Horace L. Merideth, Jr.
Box 625
H. A. Miller
Box 8
Julian David Orlansky
403-04 Weinberg Bldg.
S. Ira Pittman, Jr.
405-10 Weinberg Bldg.
Judge Zelma W. Price
Box 78
Tony P. Provenza
Box 607
Eugene J. Raphael
Woolworth Bldg.
Box 314
James Robertshaw
Weinberg Bldg.
Box 24
Geo. Ramsey Russell
Weinberg Bldg.
Laurance J. Sievers
418 Weinberg Bldg.
Earl Solomon
Weinberg Bldg.
E. B. Taylor
Leyser Bldg.
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Judge S. B. Thomas
Chancellor
W. S. Thompson
216 Woolworth Bldg.
Chas. S. Tindall, Jr.
429 Weinberg Bldg.
Charles W. Wade
Leyser Bldg.
Box 2923
John C. Webb
216 Weinberg Bldg.
Burwell B. Wilkes
411 Weinberg Bldg.
Joseph E. Wroten
Box 2765
Douglas C. Wynn
429 Weinberg Bldg.

GREENWOOD

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Box 417
A. H. Bell
Drawer 657
William H. Braden, Jr.
903 Grand Blvd.
Norman C. Brewer
Box 411
J. G. Colson
Box 364
Charles Milton Deaton
Market St.
Box 411
Durward Gray Evans
Box 411
John J. Fraiser, Jr.
Courthouse
Joseph Clay Hamilton
201 E. Jefferson
W. M. Hamner
Old Bk. of Leflore Bldg.
Willie J. Heckler
1107 Mississippi Ave.
William F. Jones
111 Beatrice
Arthur Jordan
O. L. Kimbrough
Box 516
Elizabeth Gwin Kirschten
810 Grand Blvd.
Hardy Lott
Aven Bldg.
R. Cunliffe McBee
Drawer 657
George Hite McLean
Box 516
Pearl McLellan
1300 Strong Ave.
Gerald J. Montgomery
300 Lamar St.
Paul D. Montjoy
Box 921
W. H. Montjoy
Box 906
Yerger Morehead
Whittington Bldg.
Frank K. Odom
Box 674
H. Talbot Odom
Box 674

Porter W. Peteet
Whittington Bldg.
James M. Pierce
c/o Staple Cotton
Discount Corp.
W. Market St.
M. F. Pierce
Wright Bldg.
Jas. C. Pittman, Jr.
c/o Odom & Odom
Box 674
Judge Charles Pollard
Old Bk. of Leflore Bldg.
J. Stanny Sanders
Aven Bldg.
Gordon L. Smith
804 Bell Ave.
Richard L. Smith
Box 246
Harold C. Streibich
Box 241
Seth Wheatley, Jr.
Box 389
W. M. Whittington, Jr.
Box 941
Wm. M. Whittington
Box 941
Fred Witty
Box 912

GRENADA

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Box 901
A. M. Carothers
Grenada Bank Bldg.
Jim McRae Criss
117 First St.
Box 121
Bradford J. Dye
Box 917
Bradford J. Dye, Jr.
Box 917
William H. Fedric
Grenada Bank Bldg.
Jay Gore, Jr.
Box 901
John Toliver Keeton
Box 602
William A. Lomax
Grenada Bank Bldg.
Mitchell M. Lundy
11 Evans Bldg.
Marshall Perry
Evans Bldg.
Leon E. Provine
Box 147
William O. Semmes
Box 240
William F. Winter
Box 738

GULFPORT

Bidwell Adam
1607 - 24th Ave.
E. J. Adam, Jr.
300 Hewes Bldg.
Robert B. Adam
1607 - 24th Ave.
Frank W. Alexander
Box 88
Jo Drake Arrington
411 Hewes Bldg.
Harold R. Barber, Jr.
Box 1023
Thomas D. Berry, Jr.
816 E. Beach Blvd.
Rae Bryant
Suite 5, Salloum Bldg.
Robert R. Buntin
Box 985
Everett E. Cook
24th Ave.
Box 135
Bruce G. Cornell
3rd Floor Hewes Bldg.
David Cottrell, Jr.
Hatten Bldg.
Wm. F. Dukes
5312 Quincey Ave.
Aubert C. Dunn
5th Flr., Hewes Bldg.
James Samuel Eaton
Hatten Bldg.
George E. Estes, Jr.
Box 88
William Estopinal
Medical Bldg.
Jason H. Floyd
310-12 Hewes Bldg.
Box 142
E. J. Ford, Jr.
201 Hatten Bldg.
Charles R. Galloway
307-08 Hatten Bldg.
John M. Gardner
1425 - 24th Ave.
D. M. Graham
203 Hardy Bldg.
D. M. Graham, Jr.
203 Hardy Bldg.
P. D. Greaves
Suite 308
Gulf Nat'l. Bk. Bldg.
P. C. Griffin
Box 153
Gaston H. Hewes
Hewes Bldg.
Judge Wm. G. Hewes
Chancellor
Box 454
Viola J. Hilbert
Hewes Bldg.
A. C. Hutto
Box 312
Charles E. Kennedy
310 Fisher Bldg.
Eaton A. Lang, Jr.
Hatten Bldg.
Edward M. Lindsey
Box 524
English Lindsey
Hewes Bldg.
Box 373
Ewart G. Lindsey
Box 998
Maj. Samuel T. Lloyd, Jr.
4810 Chamberlain Ave.
Judge Luther W. Maples
26th Ave.
Ernest G. Martin, Jr.
Box 985
R. B. Meadows
Hewes Bldg.
Judge Sidney C. Mize
Federal Court
Webb M. Mize
310 Gulf Nat'l Bk. Bldg.
George E. Morse
Hatten Bldg.
Box 265
Nancy Wood Morse
Hatten Bldg.
Box 265
Stanford E. Morse
Hatten Bldg.
Stanford E. Morse, Jr.
Hatten Bldg.
George F. Murrell
Box 4
Harvey G. O'Connor
4512 Jefferson Ave.
William R. Owings
Box 711
Owen T. Palmer, Jr.
2209 - 14th St.
Clayton Rand
The Dixie Press
Thomas N. Roberts, Jr.
Box 580
J. C. Ross
308-09 Hewes Bldg.
Box 178
Donald O. Simmons
Box 575
J. U. Simmons
Box 575
Upton Sisson
Box 456
George R. Smith
Legion Bldg.
Box 177
Geo. R. Smith, Jr.
American Legion Bldg.
Box 177
Robert L. Taylor
201 Hatten Bldg.
R. W. Thompson, Jr.
310 Gulf Nat'l Bk. Bldg.
Francis McRae Turner
Miss. Power Co.
Box 289
Harry G. Walker
Box 618, Sta. A

Knox W. Walker
1627 - 25th Ave.
Douglas Knox White
Abstract Bldg.
Neil W. White
Box 144
W. H. White
Abstract Bldg.
Marguerite L. Williams
1805 - 19th St.

HATTIESBURG

J. S. Albritton
Box 949
Lawrence D. Arrington
209 Carter Bldg.
Robert E. Arrington
Box 22
Bruce C. Aultman
411 Carter Bldg.
Byron H. Baker
Box 801
Frank David Barber
Box 1209
Stone Deavours Barefield
Citizens Bank Bldg.
Jefferson C. Bell
Box 1125
Roy A. Bennett
325 W. 4th St.
Carl E. Berry, Jr.
501 Michael Bldg.
J. Lee Bilberry
Box 1390
M. D. Brett
Citizens Bank
Box 1071
Irvin H. Buchalter
Box 506
Frank Wilson Buckley
Dept. of Journalism
Miss. Southern College
J. M. Byrd
Carter Bldg.
Thomas P. Caldwell
Box 1368
Robert L. Calhoun
Box 461
Lester Clark
306 Magnolia State Bldg.
Dudley W. Conner
Conner Bldg.
Harold B. Cubley
Box 969
Edward J. Currie, Jr.
508-10 Ross Bldg.
E. J. Currie, Sr.
Ross Bldg.
George G. Currie
Box 626
George W. Currie
Box 626
George C. Curry
Drawer 1561

Daniel W. Dabbs
Box 468
T. W. Davis, Jr.
Box 529
James K. Dukes
500 Tuscan Ave.
Foster C. Fant, Jr.
No. 1, Kepper Bldg.
305 Bay St.
Henry K. Farmer
310 Ross Bldg.
James Finch
Suite 207, Ross Bldg.
Lawrence Y. Foote
Drawer 1231
Davis T. Fortenberry
411 Carter Bldg.
Evelyn Gandy
Box 526
Herbert R. Ginsberg
Magnolia State Bldg.
Paul E. Grady
Box 95
Reginald A. Gray, Jr.
201 Carter Bldg.
John S. Grove
Box 1024
Wallace R. Gunn
Box 1174
Judge Stanton A. Hall
Circuit Court
Judge William Haralson
Box 132
Fleet C. Hathorn, Jr.
Box 865
Rowland W. Heidelberg, Jr.
401 Ross Bldg.
Box 1070
Paul Hardin Holmes
Box 244
Paul B. Johnson, Jr.
130½ E. Pine St.
Rex Kenton Jones
211 Chevy Chase Dr.
W. Arlington Jones
Suite 401-03, Carter Bldg.
A. F. Kelly
Geiger Bldg.
Carl W. Kepper
617 Main St.
Marie P. Kepper
Box 135
Joe R. King
304-05 Citizens Bk. Bldg.
Box 227
Alvin N. London
James F. McKenzie
401 Ross Bldg.
Frank D. Montague, Jr.
201-04 Carter Bldg.
J. Martin Mooney
Conner Bldg.
W. Pine St.

Alfred Moore
111½ E. Front St.
Box 95
C. M. Morgan, Jr.
Box 1333
Forrest M. Morris, Jr.
215 E. Front St.
Wm. H. Morrow
Box 567
Wm. V. Murry
204 Conner Bldg.
Paul M. Newton
517 Ross Bldg.
Mildred W. Norris
Box 227
Judge Thomas D. Ott
307 Citizens Bank Bldg.
Howard L. Patterson, Jr.
Box 808
Claude F. Pittman
Box 227
Claude F. Pittman, Jr.
Box 227
Homer Pittman
Box 227
Moran M. Pope, Jr.
Box 1463
William L. Richmond
119 Front St.
Box 1148
M. M. Roberts
Citizens Bank Bldg.
John Hillman Rogers
813 Crestview Dr.
Phillip Rolls
Box 1343
W. L. Shappley
Box 6
James Simrall, Jr.
411 Carter Bldg.
E. E. Staton
Box 54
Ben Stevens
316 Forrest St.
Box 1381
Joseph H. Stevens
Box 1643
Jack Stewart
Box 969
C. W. Sullivan
Box 1591
R. M. Sullivan
Box 6
T. Harris Sullivan
Ross Bldg.
Dan Gary Sutherland
401 Ross Bldg.
Box 1070
Joe Avery Thompson
Humble Oil & Rfg. Co.
Box 1368
J. Kearney Travis
Citizens Bank Bldg.
Drawer 590

Earle L. Wingo
Citizens Bank Bldg.
Elliott T. Wooton
308½ Twelfth Ave.
Francis T. Zachary
206 Carter Bldg.

HAZLEHURST

S. E. Allen, Jr.
Box 208
John T. Armstrong
Bank of Hazlehurst Bldg.
Mrs. E. R. Arrington
Box 347
R. O. Arrington, Jr
Box 347
Donald C. Cooley
Box 388
Judge J. F. Guynes
Chancellor
Harry O. Hoffman, Jr.
Bank of Hazlehurst Bldg.
Harris B. Henley
Box 509
W. S. Henley
Box 509
Carroll Kemp
Wilson Bldg.
Julius L. Lotterhos, Jr.
Box 509
Lena C. Zama
Box 108

HERNANDO

Boyce Lee Garner
F. C. Holmes, Jr.
H. Grady Johnston
R. F. B. Logan
Joel P. Walker, Jr.
Edward L. Whitten, Sr.
W. E. Wilroy
Box 5

HICKORY

W. M. Everett
Box 115
S. E. McGee

HOLLANDALE

Paul N. Nunnery
Box 333

HOLLY SPRINGS

John W. Bryant, Jr.
Fred M. Bush, Jr.
Box 377
Robert P. Crutcher
Fant & Bush
Lt. Charles N. Dean
c/o Airlie Wood
Wall Doxey, Jr.
Lester G. Fant, Jr.
Sidney L. Hurdle
First State Bk. Bldg.
John Lloyd Kennedy
Doxey & Kennedy
George H. Rather
L. A. Smith, Jr.
First State Bk. Bldg.
Fred E. Swaney
Van Dorn Ave.

HOUSTON

H. B. Abernethy
W. W. Brand
Box 128
Woodrow Wilson Brand, Jr.
Box 128
Jeff Busby
Box 123
Thomas B. Davis
432 S. Jackson St.
Armis E. Hawkins
C. H. McCraine, Jr.
Bobby Gene O'Barr
436 E. Madison

INDIANOLA

B. B. Allen
Richard M. Allen
Billy K. Chapman
125 Augusta St.
A. B. Clark
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Judge Arthur B. Clark, Jr.
Circuit Court
Edward Lionel Cook, Jr.
Forrest G. Cooper
Masonic Bldg.
Howard Q. Davis
Aaron M. Edwards
236 Sunflower Ave.
Hugh H. Lumpkin
Box 136
Gordon L. Lyon
J. H. Price
David M. Quinn, Jr.
Box 172
G. P. Ritchey
128 Main St.
Oscar B. Townsend
202 - 2nd
Roger Lewis Tuttle
Box 229

ITTA BENA

Cleveland Davis
Box 98
Perry W. Morton
Box 82

IUKA

J. O. Clark
James Barry Finch
Box 335
J. D. Finch
Cecil Lamar Sumners
Harry M. Rhine

JACKSON

Annie Lou Abel
Suite 821, Plaza Bldg.
William D. Adams
316 Boling St.
Lee B. Agnew
417½ E. Capitol
H. Chalmers Alexander
Century Bldg.
Chalmers W. Alexander
Box 291
James A. Alexander, Jr.
Box 977
Julian P. Alexander, Jr.
Box 1367
Paul G. Alexander
1847 Dep. Gty. Bk. Bldg.
William P. Alexander
Box 1284
Cecile Cambre Alford
1336 Olive St.
Sam S. Allred
Box 651
Lester Alvis, Jr.
3955 Berkley Dr.
Dan Raney Anders
Box 9035
Judge R. Olney Arrington
Asso. Justice, Supreme Ct.
New Capitol
B. Galloway Austin
247 E. Pascagoula
Ralph B. Avery
412 Plaza Bldg.
William A. Bacon
Box 15
Charles T. Barber
Box 1734
J. S. Barbour
Box 1818
Henry E. Barksdale
300 Lamar Life Bldg.
James A. Barnett
414½ E. Capitol
Ross R. Barnett
Box 1288
Ross R. Barnett, Jr.
Box 1288
John S. Beach
Box 663
Stephen L. Beach, Jr.
Box 663
Loyd Lamar Beacham, Jr.
822 Plaza Bldg.
James A. Becker, Jr.
Box 650
John A. Bellan, Jr.
1012 First Nat'l. Bk. Bldg.
William H. Bennett, Jr.
Box 56
Walter Berry
c/o Cabell Electric Co.
Box 1199

Robert A. Biggs, Jr.
Box 1370
Louis S. Bills, Jr.
All State Ins. Co.
Milner Bldg.
Richard A. Billups, Jr.
520 N. President
Alvin Binder
Box 9984
Walter R. Bivins
235 Cooper Rd.
Wm. P. Black
425 Vardaman St.
E. L. Bond
321 Sewanee Dr.
Grover L. Boone
Box 648
James A. Boone
Box 1269
Carl C. Bostic
200 S. President
Barnett Bldg.
M. P. Bouslog
Box 3032
Francis S. Bowling
431 Tombigbee, Court Sq.
South Bldg.
R. H. Bowling
Barnett Bldg.
Box 78
Richard C. Bradley
2119 Alta Woods Blvd.
Ollie D. Brame
4645 Jiggitts Rd.
Audrey W. Brand
508 E. Capitol St.
S. M. Brand
508 E. Capitol St.
James R. Brannon
Box 4316, Fondren Sta.
Dan E. Breland
408 Lamar Life Bldg.
Box 1945
Kenneth M. Britt
1720 St. Mary
Harmon W. Broom
418½ E. Pearl St.
Box 1275
Rufus H. Broome
Pearl Drive
James E. Brown
5838 Canton Park Dr.
James T. Brown
Box 330
E. L. Brunini
Box 1213
Clifton E. Bryant
4250 Athens Dr.
Noel W. Buckley
606 First Federal
Cary E. Bufkin
Box 1172
James D. Buford
Box 1172

Robert Burns
Box 158
Jack C. Burrell
Box 1972
Charles W. Busby
509 Barnett Bldg.
Millard M. Bush
Box 9984
George H. Butler
Suite 900, Milner Bldg.
Wilton V. Byars
1617 Wilhurst St.
J. L. Byrd
1007-1010 Dep. Gty. Bk.
Bldg.
Box 157
Joseph B. Cadwallader
245 Sykes Rd.
Frank L. Calderala
425½ E. Capitol St.
T. Eugene Caldwell
509 Barnett Bldg.
Box 1704
Edwin T. Calhoun
720 N. Jefferson St.
King Hayes Callicutt
Box 1172
Robert C. Cannada
Suite 900, Milner Bldg.
Robert Taylor Carlisle
Box 1269
Charles A. Carter
Plaza Bldg.—Mezzanine
Wm. O. Carter, Jr.
Box 157
Hugh Craig Castle, Jr.
1012 First Nat'l Bk. Bldg.
Edward L. Cates
Box 158
Paul Chambers
1007 Dep. Gty. Bk. Bldg.
Box 157
Reynolds Cheney
Box 1666
James K. Child, Jr.
Box 157
W. M. Childress
513½ E. Capitol St.
Bernard W. N. Chill
Box 1482
Clifford C. Chittim
Box 427
Charles Clark
Lamar Bldg.
Box 158
G. C. Clark, Jr.
107 Electric Bldg.
H. M. Clark
308 First Federal Bldg.
Thurman L. Clark
4143 Carol Drive
William W. Clark
Rt. 3, Box 321
Neal Clement
104 Meadow Heights

Percy Clifton
1st Fed. S. & L. Bldg.
J. W. Cocke
1339 Dept. Gty. Bank Bldg.
Marvin A. Cohen
Box 427
Curtis E. Coker
Box 1084
James E. Cole
120 Springfield Ave.
Gov. J. P. Coleman
New Capitol
William F. Coleman
5634 Brentwood
Aline J. Collum
3724 N. State St.
M. E. Collum, Jr.
Box 291
James O. Conner
Box 504
A. S. Coody
776 North West St.
Henry D. Cook
1216 Raymond Road
Robert F. Cooper
Box 1450
John Richard Countiss, III
202 Lamar Life Bldg.
Hansell A. Courtney
709 Dep. Gty. Bank Bldg.
Frederick G. Cox, Jr.
Box 1363
Wm. Harold Cox
1229 Dep. Gty. Bank Bldg.
John A. Craig
Box 651
Rufus Creekmore
822-25 Plaza Bldg.
Wade H. Creekmore
Pub. Service Commission
1105 Woolfolk Bldg.
Alfred N. Crisler
431 Tombigbee, Court Sq.
South Bldg.
Bert Crisler
311 Dep. Gty. Bk. Bldg.
Charles W. Crisler, Jr.
431 Tombigbee, Court Sq.
South Bldg.
Thomas W. Crockett, Jr.
Box 961
Earl R. Cruthirds
Box 1947
E. Hugh Cunningham
Box 1593
Joe H. Daniel
Box 1084
R. A. Darden
644 Choctaw Rd.
Thomas Edwin Davidson
Box 663
James L. Davis, Jr.
308 First Fed. S. & L.
Bldg.

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236 Mt. Vernon St.
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Chief Attorney
Veteran's Administration
J. Hubern Dodd
1173 Arbor Vista
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Box 9825
Colbert Dudley
1125 Grand Ave.
Vardaman S. Dunn
Plaza Bldg.
P. H. Eager, Jr.
Plaza Bldg.
Lynel C. Echols
709 Dep. Gty. Bk. Bldg.
Henry Edmonds
Box 481
Allan T. Edwards
707 Plaza Bldg.
E. Ray Edwards
Box 427
Joseph B. Elliott
4680 Londonderry Dr.
Lura Clark Ethridge
720 North St.
Judge W. N. Ethridge, Jr.
Asso. Justice
Supreme Court
William D. Evans, Jr.
202½ W. Capitol St.
Jack H. Ewing
Box 1467
Goldie Jane Feldman
900 Lamar Life Bldg.
Bethel Ferguson
Miss. Power & Light
Grey Flowers
Box 2022
Henry Grady Flowers
Box 609
Louis Fondren
Box 663
W. B. Fontaine
1623 Dep. Gty. Bk. Bldg.
Aaron L. Ford
609 Plaza Bldg.
John D. Fournet
716 Pennsylvania Ave.
John H. Fox, III
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Lawrence C. Franklin
930 Milner Bldg.
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Box 2091
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Judge Charles B. Henley
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George P. Hewes, III
Box 1213
William Leon Higgs
Box 326
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1363 Belvoir
Wiley C. Hill
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Box 124
Paul L. James
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Box 158
Erskine W. Wells
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W. Calvin Wells, Jr.
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W. Calvin Wells, III
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Box 158
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Box 1224
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James T. Crawley, Jr.
Box 827
Wm. Reynolds Ford
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D. H. Glass
Box 746
John Davis Guyton
Box 590
Chatwin M. Jackson, Jr.
Box 189
John Clark Love
Alton Massey
Box 189
C. E. Morgan
Merchants & Farmers Bk.
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Clarence E. Morgan, Jr.
Box 348
G. J. Thornton
Harold W. Williams
517 Lucas St.
Claude Jackson Woodward
Doty Bldg.

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Hoke Stone
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J. L. Austin
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E. C. Bonney
Masonite Corp.
Box 967
M. W. Boyd
Box 111
William S. Boyd, Jr.
Box 554
Harvey Breazeale, Jr.
c/o Masonite Corp.
Ronald C. Brown
Box 171
James R. Buchanan
First Nat'l Bank Bldg.
Box 230
Kenneth E. Bullock
c/o Boyd & Holifield
Box 726
Lampkin H. Butts
Box 196
J. Edwin Campbell
Box 584
Ralph P. Campbell
Box 638
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Courthouse
John Shannon Clark
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Elson K. Collins
Box 732
F. B. Collins
308 Wallace Bldg.
Jeff Collins
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Edwin Phillips Connolly
Box 527
William M. Deavours
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Philip M. Swartzfager
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Box 115
Kenneth Gordon
Box 373
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J. Hoy Hathorn
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Neal Prisock
Frank L. Reich
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Burris Olen Smith
Box 328
Harold G. Stringer
W. A. Strong, Jr.
Box 328

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H. M. Hunter
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Darwin M. Maples
J. O. Moss
Williams S. Murphy
Hugh G. Rowland
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John Alton Phillips
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Box 66
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T. H. Sullivan, Jr.
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PREFACE

This Cumulative Index covering Volumes XXI through XXX of the *Mississippi Law Journal* is supplemental to the Index published in 1950, which covered Volumes I through XX.

The *Journal* has, contained within its covers, articles of national and international import; more important, perhaps, to the Mississippi lawyer there are articles, comments and case notes concerned specifically with the law of the State of Mississippi, both substantive and procedural. The publication of the *Journal* is a cooperative and continuing effort. Much of the material published in it is the result of the work of many people, both student and faculty. This Index is no exception. It has been in preparation since 1950.

The task of directing and preparing the Index fell upon many shoulders. Jess B. Rogers, Richard H. Carlisle, Robert A. Pritchard, George D. Warren, Jr., Dorothy Clower, Walker L. Watters, Patrick Hugh Scanlon, Newt P. Harrison and M. Curtiss McKee served as Index Editors. Editors of the *Journal* during the period when much of the Index preparation was being done include Lester Stanley Cook, Jr., James T. McKenzie, Fred Cole DeLong, Dewitt T. Hicks, Jr. and Jack W. Brand.

Special recognition must be given to William M. Champion and Ben H. Stone and to the present Editor C. Willis Connell, Jr. To these students fell the task of putting together the work of the ten-year period. The labor involved in preparing the detailed material was also performed by many of the regular members of the *Journal* staff. Miss Sherry Cole, Secretary to the *Journal*, typed large portions of the manuscript. Preparation for this Index began when Professors William N. Ethridge, Jr. and Ernest M. Jones were the faculty advisers to the *Mississippi Law Journal* staff and has continued with the present faculty adviser.

The School of Law of the University of Mississippi and the *Mississippi Law Journal* are appreciative of the efforts of all who participated in this undertaking. Dean Robert J. Farley has given his continuous support and encouragement. The Mississippi State Bar has been generous in its financial support of the *Journal* and through such support has made possible the publication of this Index as well as the regular quarterly issues.

It is hoped that this Index increases the utility of the *Journal* to the end that it will serve the lawyer, judge, public official and scholar in speedily and accurately locating the desired material.

Arthur B. Custy
Faculty Adviser

The University of Mississippi
November 1, 1960

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